No. 18-485	
Title:	**Edward G. McDonough, Petitioner** **v.** **Youel Smith, Individually and as Special District Attorney for the County of Rensselaer, New York, aka Trey Smith**
Docketed:	October 16, 2018
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Numbers:	(17-296)
Decision Date:	August 3, 2018
Rehearing Denied:	September 12, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Oct 12 2018	Petition for a writ of certiorari filed. (Response due November 15, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Nov 02 2018	Motion to extend the time to file a response from November 15, 2018 to December 7, 2018, submitted to The Clerk. **Main Document**
Nov 06 2018	Motion to extend the time to file a response is granted and the time is extended to and including December 7, 2018.
Nov 15 2018	Brief amici curiae of Criminal Defense Organizations, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Brief amicus curiae of Cause of Action Institute filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 15 2018	Brief amicus curiae of Criminal Justice Institute of Harvard Law School filed. **Main Document** **Certificate of Word Count** **Proof of Service** **Other**
Dec 07 2018	Brief of respondent Youel Smith in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 17 2018	Letter waiving the 14-day waiting period under Rule 15.5 filed. **Main Document**
Dec 18 2018	Reply of petitioner Edward G. McDonough filed.

	Main Document **Certificate of Word Count** **Proof of Service**
Dec 19 2018	DISTRIBUTED for Conference of 1/4/2019.
Jan 07 2019	DISTRIBUTED for Conference of 1/11/2019.
Jan 11 2019	Petition GRANTED.
Feb 11 2019	SET FOR ARGUMENT on Wednesday, April 17, 2019
Feb 25 2019	Brief of petitioner Edward G. McDonough filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 25 2019	Joint appendix filed. **Main Document** **Proof of Service**
Feb 26 2019	Blanket Consent filed by Petitioner, Edward G. McDonough. **Blanket Consent**
Mar 04 2019	Brief amicus curiae of Criminal Justice Institute of Harvard Law School filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 04 2019	Brief amicus curiae of Cause of Action Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 04 2019	Brief amici curiae of Criminal Defense Organizations, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 04 2019	Brief amicus curiae of Constitutional Accountability Center filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 04 2019	Brief amicus curiae of United States filed. **Main Document** **Proof of Service**
Mar 04 2019	Brief amici curiae of Center on the Administration of Criminal Law at NYU School of Law, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 04 2019	Brief amici curiae of Federal Court Scholars, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 04 2019	Brief amicus curiae of St. Thomas More Lawyers Guild of Rochester, New York filed.
Mar 04 2019	Brief amicus curiae of The Innocence Network filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Mar 20 2019	CIRCULATED
Mar 21 2019	Record requested from the U.S.C.A. 2nd Circuit.
Mar 27 2019	Brief of respondent Youel Smith filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 02 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Apr 03 2019	Record received from the U.S.D.C. Northern District of New York is electronic.
Apr 03 2019	Brief amici curiae of International Municipal Lawyers Association, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 03 2019	Brief amici curiae of Indiana, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 03 2019	Motion of International Municipal Lawyers Association, et al. for leave to participate in oral argument as amici curiae and for divided argument filed. **Main Document** **Proof of Service**
Apr 03 2019	Motion of St. Thomas More Lawyers Guild of Rochester, New York for leave to participate in oral argument as amicus curiae and for divided argument filed. **Main Document** **Proof of Service**
Apr 03 2019	Motion of Indiana, et al. for leave to participate in oral argument as amici curiae and for divided argument filed. **Main Document** **Proof of Service**
Apr 10 2019	Reply of petitioner Edward G. McDonough filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 12 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 12 2019	Motion of Indiana, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Apr 12 2019	Motion of International Municipal Lawyers Association, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.

Apr 12 2019	Motion of St. Thomas More Lawyers Guild of Rochester, New York for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Apr 17 2019	Argued. For petitioner: Neal K. Katyal, Washington, D. C.; and Jeffrey B. Wall, Principal Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Thomas J. O'Connor, Albany, N. Y.
Jun 20 2019	Judgment REVERSED and case REMANDED. Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Alito, and Kavanaugh, JJ., joined. Thomas, J., filed a dissenting opinion, in which Kagan and Gorsuch, JJ., joined.

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No. 18-___

IN THE
Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor (as the majority of circuits has held) or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use (as the Second Circuit held below).

PARTIES TO THE PROCEEDING

Edward G. McDonough, petitioner on review, was the plaintiff-appellant below.

Youel Smith, individually and as Special District Attorney for the County of Rensselaer, New York, AKA Trey Smith, respondent on review, was the defendant-appellee below.

John J. Ogden, Richard McNally Jr., Kevin McGrath, Alan Robillard, County of Rensselaer, John F. Brown, William A. McInerney, Kevin F. O'Malley, Daniel B. Brown, and Anthony J. Renna were defendants below, but are not parties to this petition.

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IN THE

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No. 18-

EDWARD G. MCDONOUGH,
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YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Edward G. McDonough respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion is reported at 898 F.3d 259. Pet. App. 1a-19a. The District Court's opinions are not reported. *Id.* at 20a-84a, 85a-135a. The Second Circuit's order denying rehearing en banc is not reported. *Id.* at 136a-137a.

JURISDICTION

The Second Circuit entered judgment on August 3, 2018. Petitioner filed a timely petition for rehearing en banc, which was denied on September 12, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

The Due Process Clause of the Fifth Amendment, U.S. Const. amend. V, provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment, U.S. Const. amend. VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

> favor, and to have the Assistance of Counsel for his defence.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Section 1983 of Title 42 of the U.S. Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * .

INTRODUCTION

Petitioner Edward McDonough twice stood trial—and was ultimately acquitted—on dozens of criminal charges based on fabricated evidence. Much of the evidence was fabricated by Respondent Youel Smith, the prosecutor in McDonough's case, who forged witness affidavits in a pre-trial investigation and falsified other evidence used in grand jury proceedings and at trial. A Federal Bureau of Investigation inquiry uncovered Smith's malfeasance, and McDonough was finally cleared of all charges after a

years-long ordeal. McDonough subsequently filed this Section 1983 suit against Smith and other defendants. McDonough's suit was filed within three years of his acquittal, but more than three years from when (according to the Second Circuit) he would have first found out that fabricated evidence was being used against him. The issue in this case—which has divided seven circuits—is whether McDonough's suit is timely.

The majority rule, adopted by five courts of appeals, is that the statute of limitations for a Section 1983 claim based on fabrication of evidence begins to run when the criminal proceedings terminate in the defendant's favor. *See Floyd* v. *Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018) (per curiam); *Castellano* v. *Fragozo*, 352 F.3d 939, 959-960 (5th Cir. 2003) (en banc); *Mills* v. *Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (citing *King* v. *Harwood*, 852 F.3d 568, 579 (6th Cir. 2017)); *Bradford* v. *Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015); *Mondragón* v. *Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008).

The Third, Fifth, Sixth, Ninth, and Tenth Circuits reached that conclusion by applying this Court's precedents in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and *Wallace* v. *Kato*, 549 U.S. 384 (2007). In those cases, the Court explained that for Section 1983 claims analogous to the common law tort of malicious prosecution—as McDonough's fabrication of evidence claims are here—the statute of limitations does not begin to run until criminal proceedings terminate in the defendant's favor. *See Heck*, 512 U.S. at 483-487; *see also Wallace*, 549 U.S. at 388-390. In addition, the Seventh Circuit has held that when a criminal defendant's constitutional rights are

violated, the statute of limitations does not begin to run until the constitutional violation ends. *See Manuel* v. *City of Joliet*, 903 F.3d 667, 669-670 (7th Cir. 2018) ("*Manuel II*"). In McDonough's case, that did not occur until his acquittal. If McDonough had filed this Section 1983 suit in any of these six circuits, it would have been timely.

Not so in the Second Circuit. Breaking with the majority of courts, the Second Circuit in its decision below adopted a new rule. The court acknowledged that other circuits have held that the "fabrication cause of action accrues only after criminal proceedings have terminated." Pet. App. 12a. The court stated, however, that it "disagree[d] with those decisions." *Id.* at 13a. According to the court, the "injury for this constitutional violation occurs at the time the evidence is used against the defendant," and the statute of limitations begins to run when the criminal defendant first "becomes aware of [the] tainted evidence and its improper use." *Id.* Applying that new rule in McDonough's case, the Second Circuit held that McDonough should have known of the fabricated evidence by the end of his first trial, and that McDonough's Section 1983 suit was thus untimely. *See id.*

This Court's intervention is urgently needed. As it currently stands, nothing more than geography dictates when the statute of limitations begins to run for a Section 1983 claim alleging that a public official willfully fabricated evidence in a criminal proceeding. Worse still, the Second Circuit's position requires criminal defendants to file a civil complaint explaining why the evidence against them in an *ongoing criminal trial* is fabricated—potentially

subjecting any criminal defendant who takes the stand to cross-examination. It creates a similar problem for police officers and prosecutors, who may be forced to produce documents and submit to depositions regarding a criminal proceeding that has not yet concluded. The potential for conflicting civil and criminal judgments, moreover, poses a difficulty for courts.

The Second Circuit's ruling in this case represents a clear, acknowledged departure from six other circuits. Because the Second Circuit denied rehearing en banc, the division between the courts of appeals will persist if certiorari is not granted. This Court should accordingly grant the petition and reverse.

STATEMENT

A. Factual Background

McDonough is the former Democratic Commissioner of the Rensselaer County Board of Elections. Pet. App. 24a.[1] In 2009, an investigation uncovered that in a primary election in Troy, New York, several dozen applications for absentee ballots, as well as the absentee ballots themselves, had been falsely completed or forged. *Id.* at 24a-28a. A number of suspects were identified, including William McInerney, the Troy City Clerk who actively recruited voters for the Democratic Party in Rensselaer County, and John Brown, a Democratic member of the city coun-

[1] The facts are drawn from McDonough's complaint and the opinions below. On a motion to dismiss, the Court must "accept as true all the factual allegations in his complaint." *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 915 & n.1 (2017) ("*Manuel I*").

cil. *Id.* Because McInerney had worked on the district attorney's election campaign, a county judge appointed Smith as special prosecutor to investigate and prosecute the allegations. *Id.* at 28a.

Smith's investigation was biased. Shortly after his appointment, Smith informed McInerney and Brown that they would not be prosecuted for the ballot forgery. *Id.* at 29a. When speaking with witnesses whose absentee ballots had been falsely completed or forged, Smith showed them a photo of McInerney that was 20 years old and did not reflect his current appearance, and did not show them a photo of Brown. *Id.* at 31a. Smith also failed to interview several key witnesses with knowledge of McInerney and Brown's role in the forgery. *Id.* Smith likewise declined to investigate allegations of witness tampering. *Id.* at 32a-33a. After multiple witnesses implicated McInerney and Brown in the forgery scheme, *id.* at 100a, Smith still declined to prosecute them.

Smith took a different approach with McDonough. Smith leaked to the press that McDonough was the primary target of the investigation—even though Smith lacked probable cause to prosecute McDonough for the forgery. *Id.* at 29a, 105a. Smith interviewed McDonough repeatedly, urging him to plead guilty. *Id.* at 32a-35a. On one occasion, Smith professed animosity for McDonough's father, the Democratic Party Chair, who had "turned his back" on Smith's ambitions to run for district attorney. *Id.* at 34a (internal quotation marks omitted). When it became clear that McDonough would not plead guilty, Smith fabricated evidence implicating McDonough in the forgery.

As part of the pre-trial investigation, Smith collected affidavits from witnesses whose ballots or ballot applications had been forged. Two of those affidavits were fabricated by Smith, who presented them to the grand jury. *Id.* at 36a-37a. The witnesses whose affidavits had been fabricated later testified at trial that the signatures on their purported affidavits were not genuine. *Id.* at 37a. As the trial court stated on the record, "the first witness out of the box says there's a forged instrument that the People presented." Compl., ¶ 822, 2015 WL 9435166 (Dec. 18, 2015); *see id.* ¶¶ 816-830.

Smith also aided multiple witnesses in preparing written statements that falsely implicated McDonough in the ballot forgery. For example, six months before the grand jury was empaneled, Smith pressured Kevin McGrath, another suspect in the case, into "falsely incriminat[ing]" McDonough in a sworn statement. *Id.* ¶¶ 617-620; *see* Pet. App. 34a. Prior to trial, Smith also assisted McInerney in preparing a false statement implicating McDonough, which served as a basis upon which other witnesses fabricated their testimony. Pet. App. 65a-67a (finding that McInerney's statement was intended to influence the testimony of other witnesses and was accordingly not entitled to absolute immunity); *see also* Compl., ¶ 333.

In 2010, Smith commenced grand jury proceedings against McDonough and another defendant. Pet. App. 34a. Smith offered cooperation agreements to witnesses, who in turn falsely incriminated McDonough before the grand jury. *See id.* at 34a-36a. A police investigator working with Smith testified before the grand jury that he had reviewed

the handwriting on the forged absentee ballot applications and concluded that the handwriting came from the same person. *Id.* at 35a. The investigator later admitted at trial that his testimony before the grand jury "was not correct and a mistake." *Id.* at 35a-36a (internal quotation marks omitted).

Before the grand jury, witness Kevin O'Malley initially testified that he had been involved in the forgery, but he did not implicate McDonough. *Id.* at 36a. Smith then e-mailed O'Malley's lawyer, threatening to prosecute O'Malley and "warning that it made no sense for [O'Malley] to protect" McDonough. *Id.* (internal quotation marks omitted). O'Malley then returned to the grand jury and testified, falsely, that McDonough had told him to complete certain absentee ballot applications. *Id.* O'Malley later admitted at trial that Smith had called him at his home the night before O'Malley changed his testimony. *Id.*

McDonough was indicted by the grand jury and charged with 38 counts of felony forgery and 36 counts of felony criminal possession of a forged instrument. *Id.* McDonough moved to disqualify Smith as special prosecutor, but his motion was unsuccessful. *Id.* at 37a. In 2011, McDonough contacted the U.S. attorney's office and requested an FBI investigation of his prosecution. *Id.* at 38a. The FBI agent assigned to the case gathered sufficient evidence to implicate McInerney in the forgery scheme. *Id.* The agent also found that Smith had been untruthful when he informed police that McInerney and Brown could not be prosecuted due to insufficient evidence. *Id.* McInerney was subsequently arrested and charged with forgery. *Id.* at

39a. Smith, however, offered McInerney a cooperation agreement, and McInerney pled guilty to one felony count and was sentenced to a 90-day work order. *Id.* In exchange for his cooperation, Brown similarly pled guilty to one felony count. *Id.*

McDonough, in contrast, was tried before two juries. *Id.* at 40a-41a. At trial, several witnesses—many of whom had been given cooperation agreements by Smith—gave false testimony against McDonough. *Id.* at 40a. At McDonough's second trial, the court ordered the testimony of one of those witnesses, Anthony Renna, stricken in its entirety due to the testimony's apparent falsity. *Id.* The judge instructed Renna to immediately leave the courthouse. *Id.* McDonough's first trial ended in a mistrial. *Id.* at 5a-6a. At the end of his second trial, the jury acquitted McDonough. *Id.* at 41a.

B. Procedural History

McDonough was acquitted on December 21, 2012. *Id.* He filed this Section 1983 suit in the U.S. District Court for the Northern District of New York on December 18, 2015, less than three years later. *Id.* at 23a. The suit raises two claims. First, McDonough alleges that Smith (and others, including McInerney) violated his constitutional rights by fabricating evidence used in the criminal proceedings. *Id.* at 47a. McDonough claims that his rights were violated under the Fourth, Fifth, Sixth, and Fourteenth Amendments. *See id.* at 49a; *see also* Compl., ¶¶ 1210-1213.[2] Second, McDonough alleges

[2] This Court has not determined whether a Section 1983 claim based on fabrication of evidence arises under the Fourth, Fifth, Sixth, or Fourteenth Amendments, nor is there agree-

that Smith and others engaged in malicious prosecution. Pet. App. 47a.

The district court dismissed as untimely McDonough's Section 1983 claim based on fabrication of evidence. *Id.* at 48a-53a; *see id.* at 94a. According to the district court, the statute of limitations on that claim began to run when McDonough learned, or should have learned, of the fabricated evidence, which the district court concluded occurred well before McDonough's acquittal. Pet. App. 52a-53a. The district court permitted McDonough's malicious prosecution claim to proceed against McInerney, citing the written statement in which McInerney fabricated evidence at Smith's direction that implicated McDonough. *Id.* at 64a-69a.

The district court dismissed McDonough's malicious prosecution claim against Smith, holding that "prosecutors generally have absolute immunity from malicious prosecution claims." *Id.* at 109a. The district court noted that Smith may *not* have absolute immunity from McDonough's fabrication of evidence claim, but it did not reach that issue. *Id.* at

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ment on that issue among the courts of appeals. *See, e.g.*, *Morse* v. *Fusto*, 804 F.3d 538, 547 n.7 (2d Cir. 2015) ("[T]his Circuit has been inconsistent as to whether fabrication of evidence claims arise under the Sixth Amendment right to a fair and speedy trial, or under the due process clauses of the Fifth and Fourteenth Amendments." (alterations and internal quotation marks omitted)); *Mondragón*, 519 F.3d at 1083 ("The Supreme Court has not yet explicitly decided whether such a claim exists in these circumstances under the Fourth Amendment or the procedural component of the Due Process Clause."). McDonough accordingly raised and preserved claims under each of those constitutional provisions.

112a ("The Court acknowledges that [McDonough] has sufficiently alleged that some of Defendant Smith's actions were taken in an investigative role * * *."); *id.* at 113a-114a ("If Plaintiff's fabrication of evidence claim was timely, * * * then the distinction between investigative and prosecutorial acts would be relevant."); *see also Castellano*, 352 F.3d at 958 (Courts have "held that non-testimonial pretrial actions, such as the fabrication of evidence, are not within the scope of absolute immunity.").

The district court entered judgment with respect to Smith under Federal Rule of Civil Procedure 54(b), certifying the dismissal of McDonough's claims against Smith for appeal. Pet. App. 4a. McDonough's claims against other parties, including McInerney, remain pending in the district court.

The Second Circuit affirmed. It "acknowledge[d]" that in other circuits, a "fabrication cause of action accrues only after criminal proceedings have terminated." *Id.* at 12a. It nevertheless "disagree[d] with those decisions." *Id.* at 13a. According to the Second Circuit, "[b]ecause the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted," the statute of limitations begins to run "when he becomes aware of [the] tainted evidence and its improper use" and "his liberty has been deprived in some way." *Id.* at 10a, 13a. The court concluded that McDonough learned of the fabricated evidence "at the latest, by the end of his first trial, after all of the prosecution's evidence had been presented," and that "there is no dispute in this case that McDonough suffered a liberty deprivation." *Id.*

at 10a, 13a-14a.[3] The Second Circuit accordingly affirmed the district court's dismissal of McDonough's fabrication of evidence claim as untimely. *Id.* at 19a.[4]

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS A DEEP AND ACKNOWLEDGED CIRCUIT SPLIT OVER WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN ON A SECTION 1983 FABRICATION OF EVIDENCE CLAIM.

The Second Circuit's decision creates a clear split with six other courts of appeals, as well as numerous district courts. In its opinion below, the Second Circuit held that the statute of limitations for a Section 1983 claim alleging fabrication of evidence begins to run when a criminal defendant "becomes aware of [t]he tainted evidence and its improper use." *Id.* at 13a. In stark contrast, five other courts of appeals have held that the statute of limitations begins to run only once criminal proceedings have terminated in the defendant's favor. *See Floyd*, 722 F. App'x at 114; *Castellano*, 352 F.3d at 959-960; *Mills*, 869 F.3d at 484; *Bradford*, 803 F.3d at 387-389; *Mondragón*, 519 F.3d at 1083. The Second

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[3] The district court held that McDonough suffered a liberty deprivation when he was required to appear at trial and comply with other restrictions imposed by New York law. *See* Pet. App. 57a

[4] The Second Circuit also affirmed the dismissal of McDonough's malicious prosecution claim against Smith. *See* Pet. App. 17a-19a. That ruling is not at issue in this petition.

Circuit's decision is also contrary to the position of the Seventh Circuit, which holds that the statute of limitations begins to run on a fabrication of evidence claim when the constitutional violation ends—not when the criminal defendant notices the fabrication. *See Manuel II*, 903 F.3d at 669-670. That division of authority is outcome-determinative in this case: In every other circuit to have examined the issue, McDonough's Section 1983 claim would be timely. Given this clear split, the Court's intervention is warranted.

A. The Circuits Are Divided Over When The Statute Of Limitations Begins To Run.

1. In its decision below, the Second Circuit deliberately departed from the majority rule applied by five other circuits. The court acknowledged that "the alleged creation or use of [fabricated] evidence by both investigating officers and the prosecutor[ ] works an unacceptable corruption of the truth-seeking function of the trial process." Pet. App. 10a (internal quotation marks omitted). It held, however, that this constitutional harm occurs when the fabricated evidence is *first* used. *See id.* at 13a. Based on that reasoning, the Second Circuit concluded that the statute of limitations for a fabrication of evidence claim begins to run as soon as the criminal defendant becomes *aware* that fabricated evidence has been used against him (and his liberty has been deprived). *Id.* "For McDonough," the Second Circuit opined, "this was, at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial, after all of the prosecution's evidence had been presented," making McDonough's Section 1983 claim untimely. *Id.* at 13a-14a.

The Second Circuit "acknowledge[d]" that in multiple other circuits, the statute of limitations for a fabrication of evidence claim begins to run "only after criminal proceedings have terminated because those circuits have concluded that fabrication of evidence claims are analogous to claims of malicious prosecution, which require termination of the criminal proceeding in the defendant's favor before suit may be brought." *Id.* at 12a-13a (citing *Floyd*, 722 F. App'x at 114, *Bradford*, 803 F.3d at 388-389, and *Mondragón*, 519 F.3d at 1083). The Second Circuit nevertheless chose to depart from those decisions. *Id.* at 13a. McDonough sought en banc review of the panel decision, emphasizing that the court's ruling was contrary to the position adopted by numerous other circuits. The Second Circuit nevertheless denied McDonough's petition for rehearing en banc, cementing the court's departure from the majority rule. *See id.* at 136a-137a.

The Second Circuit's position has been followed by several federal district courts. In a decision predating *Manuel II*, the U.S. District Court for the Northern District of Illinois stated that the statute of limitations on a fabrication of evidence claim begins to run "at the moment [government officials] used the fabricated evidence to deprive [the criminal defendant] of his liberty," rather than at the termination of criminal proceedings. *Lewis* v. *City of Chicago*, No. 16-CV-7592, 2017 WL 698682, at *3 (N.D. Ill. Feb. 22, 2017). Other district courts have likewise adopted the Second Circuit's position. *See, e.g.*, *Rehberg* v. *Paulk*, No. 1:07-CV-22 (WLS), 2009 WL 7772286, at *4 (M.D. Ga. Mar. 31, 2009); *Smith* v. *King*, No. 07-0268-CG-B, 2009 WL 1635757, at *5 (S.D. Ala. June 9, 2009).

2. In stark contrast with the Second Circuit, the Ninth Circuit holds that the statute of limitations for a Section 1983 claim based on fabrication of evidence does not begin to run until criminal proceedings terminate in the defendant's favor. *See Bradford*, 803 F.3d at 387-389. The Ninth Circuit based its conclusion on this Court's opinion in *Wallace*. There, the Court evaluated when the statute of limitations begins to run on a Section 1983 claim seeking damages for false arrest. *See Wallace*, 549 U.S. at 386-387. To answer that question, the Court looked to the treatment at common law of the analogous torts of false arrest and false imprisonment. *See id.* at 387-388. This Court reasoned that because the statute of limitations for those torts does not begin to run until the false imprisonment ends, the statute of limitations for an analogous Section 1983 claim similarly does not begin to run until the false imprisonment ends. *See id.* at 388-389.

Drawing on the principles enunciated in *Wallace*, the Ninth Circuit in *Bradford* held that "a court evaluates the proper accrual date for a claim by identifying the common law analogue for the § 1983 claim and applying any 'distinctive' accrual rules associated with that common law analogue." 803 F.3d at 388. In a Section 1983 suit based on fabrication of evidence, the Ninth Circuit identified the constitutional right at issue as "the right to be free from criminal charges based on a claim of deliberately fabricated evidence." *Id.* (alterations and internal quotation marks omitted). The court concluded that this right "is similar to the tort of malicious prosecution, which involves the right to be free from the use of legal process that is motivated by malice and unsupported by probable cause." *Id.*

At common law, the statute of limitations for the tort of malicious prosecution does not begin to run "until the proceedings against the plaintiff have terminated in such a manner that they cannot be revived." *Id.* (alterations and internal quotation marks omitted). The Ninth Circuit accordingly applied that same statute of limitations rule to the claim at issue in *Bradford*. The court concluded that the statute of limitations for a Section 1983 claim based on fabrication of evidence begins to run only once the charges against the criminal defendant are "fully and finally resolved." *Id.* at 389.

The Ninth Circuit explained that its position is both legally correct and makes practical sense. As the Ninth Circuit emphasized, if a criminal defendant were required to file a Section 1983 suit *prior* to the conclusion of criminal proceedings, the public official named in the suit would almost certainly move to stay the civil proceedings while the criminal proceedings were ongoing. *See id.* at 388. In such a scenario, the public official "would not only not be prejudiced by a delay in reaching the merits, he might well have benefitted from it." *Id.*

Four other courts of appeals have adopted the rule espoused by the Ninth Circuit. In *Floyd*, the Third Circuit stated that "fabrication of evidence claims do not accrue until the criminal proceedings have terminated in [the defendant's] favor." 722 F. App'x at 114. In reaching that conclusion, the Third Circuit cited the Ninth Circuit's decision in *Bradford* for the proposition that a "claim alleging fabrication of evidence" should be treated "in the same way as [a] claim of malicious prosecution." *Id.*

The Fifth Circuit reached a similar conclusion in *Castellano*, this time relying on the Court's opinion in *Heck*. *See Castellano*, 352 F.3d at 959-960. In *Heck*, the Court emphasized that civil claims that implicate the validity of a conviction or sentence should be brought *after* criminal proceedings conclude. *See* 512 U.S. at 484-487. Citing *Heck*, the Fifth Circuit explained in *Castellano* that it had "no occasion * * * to consider afresh the federal common law footing of our insistence that a state criminal proceeding terminate in favor of a federal plaintiff complaining of constitutional deprivations suffered in a state court prosecution, a rule reflecting powerful governmental interests in finality of judgments." 352 F.3d at 959. The Fifth Circuit emphasized that "[t]he heart of [the defendant's] claim is that the prosecution obtained his arrest and conviction by use of manufactured evidence and perjured testimony." *Id.* at 959-960. Because the criminal defendant's "proof directly implicated the validity of his conviction," the Fifth Circuit concluded that the statute of limitations did not begin to run "until the case was dismissed for insufficient evidence by the state trial court." *Id.* at 360. The Fifth Circuit recently reaffirmed its position in *Winfrey* v. *Rogers*, 901 F.3d 483, 492-493 (5th Cir. 2018).

The Sixth Circuit followed suit in *Mills*, explaining that "[t]he basis of a fabrication-of-evidence claim under § 1983 is an allegation that a defendant knowingly fabricated evidence against a plaintiff, and that there is a reasonable likelihood that the false evidence could have affected the judgment of the jury." 869 F.3d at 484 (alterations and internal quotation marks omitted). For such a claim, the Sixth Circuit held that the statute of limitations "does not begin to

run while a criminal indictment on the same charges is outstanding." *Id.* The court cited its earlier decision in *King*, which explained that "[b]ecause an element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused, the statute of limitations in such an action does not begin to run until the plaintiff knows or has reason to know of such favorable termination." 852 F.3d at 578 (internal quotation marks and citation omitted). "Were it not so," the Sixth Circuit stated in *King*, "the plaintiff would be compelled to sue during the pendency of the allegedly malicious prosecution, risking the possibility of the plaintiff's succeeding in the tort action after having been convicted in the underlying criminal prosecution." *Id.* (internal quotation marks omitted). The court concluded that this result would be "in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Id.* (quoting *Heck*, 512 U.S. at 484).

In *Mondragón*, the Tenth Circuit also adopted the majority rule. *See* 519 F.3d at 1083. There, the court looked to this Court's opinion in *Wallace* to determine when a Section 1983 claim based on fabrication of evidence is timely. *See id.* at 1082-1083. The Tenth Circuit read *Wallace* as distinguishing between claims based on constitutional violations that occur *prior* to the institution of legal process, and claims based on constitutional violations that occur *after* the institution of legal process. *See id.* The court concluded that "[a]fter the institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim," and the statute of limitations begins to run for such a

claim "at the earliest, when favorable termination occurs." *Id.* at 1083.

A number of federal district courts in circuits that have not addressed the question presented have similarly applied *Heck* and *Wallace* to determine when the statute of limitations begins to run for a Section 1983 claim based on fabrication of evidence. Those courts have analyzed when a conviction was vacated or overturned, rather than when the criminal defendant learned of the fabrication, to determine the limitations period. *See, e.g.*, *Echavarria* v. *Roach*, No. 16-cv-11118, 2017 WL 3928270, at *6 (D. Mass. Sept. 7, 2017) (holding that statute of limitations on fabrication of evidence claim began to run when plaintiff's motion for a new trial was granted); *Gates* v. *District of Columbia*, 66 F. Supp. 3d 1, 27 (D.D.C. 2014) (holding that statute of limitations for fabrication of evidence claim did not begin to run "until the court vacated [the defendant's] conviction"); *Taylor* v. *Deaver*, No. 5:11-CV-341-H, 2012 WL 12905868, at *6 (E.D.N.C. Sept. 28, 2012) (similar).

The Third, Fifth, Sixth, Ninth, and Tenth Circuits thus all reach the same conclusion: The statute of limitations for a Section 1983 claim based on fabrication of evidence begins to run only once criminal proceedings have terminated in the defendant's favor. The Second Circuit, in contrast, holds that the statute of limitations begins to run once the defendant finds out (or should have found out) about the fabrication. The district courts are likewise divided. This Court should grant certiorari to resolve the clear, acknowledged split. *See, e.g.*, *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 917 (2017) ("*Manuel I*") (grant-

ing certiorari to correct "outlier" position of Seventh Circuit in Section 1983 case).

4. In addition to creating a clear split with five other circuits, the Second Circuit's decision also departs from the statute of limitations rule applied by *eleven* circuits in Section 1983 cases alleging a constitutional violation under *Brady* v. *Maryland*, 373 U.S. 83 (1963). In a *Brady* case, the issue is whether a public official has withheld exculpatory evidence, a claim akin to the fabrication of evidence claim at issue in this case. Although the courts of appeals are divided over the precise statute of limitations rule to apply in *Brady* cases, *none* of those courts has held that the statute of limitations begins to run as soon as the criminal defendant discovers that exculpatory evidence has been withheld. *See* Pet. at 6-7, *Carpenter* v. *Jordan*, No. 18-73 (July 11, 2018) (response requested on Sept. 7, 2018) (describing different approaches).

In crafting a new statute of limitations rule in this case, the Second Circuit accordingly departed not only from the rule applied by a majority of circuits in fabrication of evidence cases, but also from the rule applied by courts in *Brady* cases. The fundamental constitutional rights at stake in both situations—including the right to a fair trial and due process of law—are similar. *See Brady*, 373 U.S. at 87 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."). For this reason as well, the Court should grant certiorari to address when the statute of limitations begins to run in a fabrication of evidence suit.

B. The Circuits Are Divided Over Whether The Statute Of Limitations Begins To Run Afresh Each Day A Criminal Defendant's Rights Are Violated.

This case also presents one other split. In *Manuel I*, this Court evaluated a Section 1983 claim brought by a criminal defendant who had been arrested and detained prior to trial based on fabricated evidence. *See* 137 S. Ct. at 914-916. After concluding that the defendant's claims were cognizable under the Fourth Amendment, this Court left open whether the statute of limitations began to run afresh each day that the defendant's constitutional rights were violated. *See id.* at 921-922 (citing *Albright* v. *Oliver*, 510 U.S. 266, 280 (1994) (Ginsburg, J., concurring) ("The time to file the § 1983 action should begin to run not at the start, but at the end of the episode in suit, *i.e.*, upon dismissal of the criminal charges * * *.")).

On remand in *Manuel II*, the Seventh Circuit addressed that issue. It held that "[w]hen a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends." 903 F.3d at 669. Thus, the court concluded that "[t]he wrong of detention without probable cause continues for the duration of the detention," and that the statute of limitations accordingly begins to run "when the detention ends." *Id.* at 670. The Seventh Circuit allowed the criminal defendant's Section 1983 suit based on fabrication of evidence to go forward on that basis. *See id.*

The Second Circuit adopted the opposite approach in this case. McDonough argued below that his fabrication of evidence claim was "timely because his wrongful prosecution constituted a continuing viola-

tion, that only ceased on his acquittal." Pet. App. 16a (alterations and quotation marks omitted). The Second Circuit disagreed, holding that McDonough was instead injured each time the fabricated evidence was used, including when "Smith allegedly fabricated evidence, then presented that evidence to a grand jury, and later used it at McDonough's trials." *Id.* at 17a. Finding no continuing violation, the Second Circuit concluded that the statute of limitations began to run when McDonough *first* "became aware of the fabricated evidence, which was, at the latest, during the first trial." *Id.*

The disagreement between the Second Circuit and the Seventh Circuit is clear. In the Second Circuit, where a criminal defendant asserts that his constitutional rights (including his Fourth Amendment rights) have been violated based on fabricated evidence, the statute of limitations begins to run as soon as the defendant becomes aware that fabricated evidence has been used against him. In the Seventh Circuit, in contrast, the statute of limitations begins to run only once the constitutional violation ends. This straightforward division of authority is worthy of the Court's attention, and the Court should grant certiorari to resolve it.

II. THE DECISION BELOW IS WRONG.

The Court should also grant certiorari because the position adopted by the Second Circuit, on a grave constitutional matter, is wrong. In *Heck* and *Wallace*, this Court set forth the proper procedure for determining when the statute of limitations begins to run in a Section 1983 case. Under those precedents, a court must first identify the right at issue, and then compare that right to the most analogous tort at

common law. The statute of limitations rule governing that analogous tort then determines the statute of limitations for the Section 1983 claim. *See Heck*, 512 U.S. at 483-487; *Wallace*, 549 U.S. at 388-390. The Second Circuit never performed that crucial analysis, and it accordingly reached the wrong result in this case. Even if the Second Circuit were correct to conduct a free-floating inquiry into the constitutional rights at issue to determine when the statute of limitations begins to run, however, the Second Circuit failed to properly identify those rights. This Court has made clear that when a criminal defendant's constitutional rights are violated by the wrongful initiation and continuation of judicial process, the statute of limitations does not begin to run until the criminal proceedings end. For that reason too, McDonough's suit is timely, and this Court should reverse.

1. Applying the straightforward approach set out by this Court in *Heck* and *Wallace*, McDonough's Section 1983 suit is timely. As the Court explained in *Wallace*, a Section 1983 claim seeking damages for the violation of constitutional rights *prior* to the institution of legal process is analogous to the common law tort of false arrest or false imprisonment. *See* 549 U.S. at 389-390. "That tort provides the proper analogy" because "[t]he sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*." *Id.* at 389. At common law, the statute of limitations for the tort of false imprisonment begins to run once the false imprisonment ends. *See id.* A Section 1983 claim premised on a constitutional injury analogous to the tort of false imprisonment accordingly begins to run

when a criminal defendant's false imprisonment ends and legal process begins. *See id.*

A Section 1983 claim seeking damages for the violation of constitutional rights *after* the institution of legal process, in contrast, is analogous to the tort of malicious prosecution. *See id.* at 390. As this Court has explained, that tort "remedies detention accompanied, not by the absence of legal process, but by *wrongful institution* of legal process." *Id.* (emphasis added); *see also Heck*, 512 U.S. at 483-484. After legal process has been initiated, "any damages recoverable must be based on a malicious prosecution claim and on the *wrongful use* of judicial process rather than detention itself." *Wallace*, 549 U.S. at 390 (emphasis added and internal quotation marks omitted); *see also* Restatement (Second) of Torts § 655 (1977) (tort of malicious prosecution includes wrongfully "continuing or procuring the continuation of criminal proceedings"). At common law, the statute of limitations for the tort of malicious prosecution does not begin to run until "termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. A Section 1983 claim premised on a constitutional injury analogous to the tort of malicious prosecution accordingly begins to run only once the criminal proceedings have terminated in the defendant's favor. *See id.* at 484-487.

McDonough's Section 1983 suit does not seek damages for unlawful arrest or detention prior to the institution of legal process. It instead seeks damages for the deprivation of McDonough's Fourth, Fifth, Sixth, and Fourteenth Amendment rights *after* legal process was instituted. Whether characterized as a seizure without probable cause, a violation of due

process, or the absence of a fair trial, McDonough's claim centers on Smith's initiation and maintenance of criminal proceedings against him based on evidence that Smith *knew* to be fabricated. Because McDonough seeks damages for the period following the institution of legal process, under *Heck* and *Wallace*, his Section 1983 claim is analogous to the tort of malicious prosecution. *See, e.g.*, *Mondragón*, 519 F.3d at 1083 ("After the institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim."). The statute of limitations for McDonough's Section 1983 claim accordingly did not begin to run until his acquittal, when criminal proceedings indisputably terminated in his favor. *See Manuel I*, 137 S. Ct. at 920 (courts may "adopt wholesale the rules that would apply in a suit involving the most analogous tort"). McDonough filed suit within three years of that date, making his suit timely.

The Second Circuit did not identify the common law tort analogous to McDonough's fabrication of evidence claim, nor did it apply the statute of limitations rule associated with that tort. The Second Circuit accordingly erred in dismissing McDonough's Section 1983 suit as untimely.

2. Instead of applying the straightforward approach set out by this Court in *Heck* and *Wallace*, the Second Circuit stated—without citation—that "the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted." Pet. App. 13a. Working from that faulty premise, the court concluded that the statute of limitations begins to

run when the criminal defendant "becomes aware of [the] tainted evidence and its improper use." *Id.* The Second Circuit was wrong on both counts.

First, the Second Circuit erred in its characterization of the constitutional violation at issue. In *Wallace*, this Court explained that for a Section 1983 claim analogous to the tort of malicious prosecution, the constitutional injury is the "*wrongful institution* of legal process." 549 U.S. at 390. After the institution of such process, this Court explained, "any damages recoverable must be based on a malicious prosecution claim and on the *wrongful use* of judicial process." *Id.* (emphasis added and internal quotation marks omitted). This Court made a similar statement in *Heck*, where it suggested that the "gravamen" of the tort of malicious prosecution (as opposed to a complaint about abuse of process) is the "wrongfulness of the prosecution," which persists through the "lawful conclusion" of the criminal proceedings. 512 U.S. at 486 n.5.

Here, McDonough's complaint is not that Smith used fabricated evidence against him at one point in the criminal proceedings. It is that Smith wrongfully *instituted and maintained* criminal proceedings against him based on fabricated evidence, depriving McDonough of due process, a fair trial, and his liberty throughout those proceedings. That is precisely the constitutional injury identified in *Heck* and *Wallace*. As the Ninth Circuit explained in *Bradford*, a Section 1983 suit based on fabrication of evidence seeks to vindicate the "right to be free from criminal charges based on a claim of deliberately fabricated evidence," not the right to be free from a single use of such evidence. 803 F.3d at 388 (altera-

tions and internal quotation marks omitted). Because the Second Circuit misidentified the constitutional right at issue, it failed to apply the correct statute of limitations rule. *See Manuel I*, 137 S. Ct. at 921 ("[C]ourts must closely attend to the values and purposes of the constitutional right at issue."). This Court explained in *Heck* and *Wallace* that where a criminal defendant seeks to vindicate a constitutional injury analogous to the tort of malicious prosecution—as McDonough plainly does here—the statute of limitations does not begin to run until criminal proceedings terminate in the defendant's favor. *See supra* pp. 24-26.

Second, even if the Second Circuit were correct about the kind of constitutional harm at stake, it nevertheless erred in determining when the statute of limitations began to run. In its decision below, the Second Circuit relied on an earlier circuit precedent, *Veal* v. *Geraci*, 23 F.3d 722 (2d Cir. 1994), which held that the statute of limitations for a Section 1983 claim begins to run when the criminal defendant learns that his constitutional rights have been violated. *See* Pet. App. 10a-11a (citing *Veal*, 23 F.3d at 724). *Veal* in turn cited an even earlier circuit decision, *Woods v. Candela*, 13 F.3d 574 (2d Cir. 1994), which had adopted that position. *See id.* at 575-576. There is only one problem: *Woods* was granted, vacated, and remanded by this Court following its decision in *Heck*—presumably because it applied the wrong approach to calculating the statute of limitations in a Section 1983 suit. *See* 115 S. Ct. 44 (1994) (mem.).

The precedent relied on by the Second Circuit in this case is thus directly contrary to this Court's

rulings, as this Court has already concluded. *See id.* In *Heck*, this Court held that the statute of limitations for a Section 1983 claim based on the withholding of exculpatory evidence and the use of illegal trial procedures begins to run when the criminal proceedings *terminate* in the defendant's favor. *See* 512 U.S. at 486-487. Similarly, in *Wallace*, this Court held that the statute of limitations for a Section 1983 claim based on false imprisonment begins to run when the false imprisonment *ends*. *See* 549 U.S. at 389. Neither of those cases supports the Second Circuit's rule here, which pegs the statute of limitations to the criminal defendant's subjective knowledge of the violation of his constitutional rights.

3. The Second Circuit also erred when it rejected McDonough's argument that "the use of fabricated evidence against him constituted a continuing violation that renders his claim timely." Pet. App. 8a. According to the Second Circuit, "[t]he continuation of the prosecution does not, by itself, constitute a continuing violation that would postpone the running of the statute of limitations until his acquittal." *Id.* at 17a. As noted, however, this Court has expressly held that for a Section 1983 claim analogous to the tort of malicious prosecution, the constitutional injury is the "wrongful institution of legal process" and the "wrongful use of judicial process"—not the first use of fabricated evidence in a criminal proceeding. *Wallace*, 549 U.S. at 390 (emphasis and internal quotation marks omitted). In proceedings before the New York state court, McDonough was indicted and prosecuted through *two separate trials* based on evidence willfully fabricated by his prosecutor. That constitutional harm did not end the first time fabri-

cated evidence was used against him, but instead persisted throughout the criminal proceedings.

This conclusion is supported by the Seventh Circuit's decision on remand in *Manuel II*, where the court evaluated when the statute of limitations begins to run on a Section 1983 claim based on fabrication of evidence. *See* 903 F.3d at 669-670. Contrary to the approach adopted by the Second Circuit, the Seventh Circuit held that the constitutional violation in that case—the criminal defendant's detention based on a fabricated report concluding that the defendant possessed illegal drugs, when he in fact possessed vitamins—was "ongoing rather than discrete." *Id.* at 669. Because the defendant's harm was ongoing, the Seventh Circuit concluded that the statute of limitations began to run when the constitutional violation *ended*, not when the defendant found out about it. *See id.* at 669-670. Under that rule, McDonough's Section 1983 claim is plainly timely, warranting reversal.

4. Two courts of appeals—the Fifth Circuit and the Sixth Circuit—have looked to the principles enunciated in this Court's opinion in *Heck* to set the statute of limitations rule for a fabrication of evidence claim. *See Castellano*, 352 F.3d at 959-960; *Mills*, 869 F.3d at 484 (citing *King*, 852 F.3d at 579). This Court held in *Heck* that where a criminal defendant has been convicted, he cannot bring a Section 1983 claim analogous to malicious prosecution until his conviction is invalidated. *See* 512 U.S. at 486-487. The Court explained that "concerns for finality and consistency" undergirded its ruling, which was designed to "avoid[] parallel litigation over the issues of probable cause and guilt," and to "pre-

clude[ ] the possibility" of a criminal defendant "succeeding in the tort action after having been convicted in the underlying criminal prosecution." *Id.* 484-485 (internal quotation marks omitted).

In *Castellano*, the Fifth Circuit relied on those principles to hold that the statute of limitations does not begin to run on a fabrication of evidence claim until criminal proceedings have terminated in the defendant's favor. *See* 352 F.3d at 959. The Fifth Circuit cited "powerful governmental interests in finality of judgments" to support its position. *Id.* In *Mills*, the Sixth Circuit likewise relied on circuit precedent emphasizing that criminal proceedings should conclude before civil suits begin in order to prevent the possibility of conflicting judgments in criminal and civil cases. *See* 869 F.3d at 484 (citing *King*, 852 F.3d at 579).

The Fifth and Sixth Circuit's opinions in *Castellano* and *Mills* demonstrate the important legal principles behind the majority rule that the statute of limitations does not begin to run on a fabrication of evidence claim until criminal proceedings terminate in the defendant's favor. The Second Circuit's position, in contrast, violates those principles. Under the Second Circuit's rule, McDonough was required to file a civil suit against Smith before the criminal proceedings terminated, raising the possibility of conflicting judgments in the civil and criminal proceedings. For that reason as well, the Second Circuit's judgment should be reversed.

III. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is critically important. It is undisputed that the Constitution protects criminal

defendants from the willful fabrication of evidence by public officials. In order to vindicate their constitutional rights, however, criminal defendants need to know when to file suit. Public officials similarly need to understand the scope of their liability, and courts need a clear rule to determine when a suit is timely, and when it is not. This case is an ideal vehicle to address those crucial issues.

Although the Court has said that the use of fabricated evidence is a practice that the Constitution "cannot tolerate," *Miller* v. *Pate*, 386 U.S. 1, 7 (1967), fabrication remains a "disturbingly common cause of wrongful convictions." Br. of Amici Curiae the American Civil Liberties Union, Bronx Defenders, Brooklyn Defender Services, Center for Appellate Litigation, Connecticut Innocence Project, The Innocence Project, The Legal Aid Society, National Association of Criminal Defense Lawyers, Neighborhood Defender Service of Harlem, New York County Defender Services, New York State Association of Criminal Defense Lawyers, Office of the Appellate Defender, and Vermont Office of the Defender General at 1, *McDonough*, 898 F.3d 259 (No. 17-0296-cv), 2018 WL 4191173, at *1. Section 1983 suits provide a federal avenue for holding those who violate the rights of criminal defendants accountable. *See Manuel I*, 137 S. Ct. at 916; *see also City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) ("[T]he deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983."). That is particularly important here, where Smith's actions cannot be characterized as an oversight or a mistake. Smith deliberately fabricated evidence, including witness affidavits, used in criminal proceedings against

McDonough. The statute of limitations rule adopted by this Court will determine the extent to which public officials will be held accountable for such actions.

The question presented is also of great practical importance. If this Court allows the decision below to stand, criminal defendants in the Second Circuit will in many cases be forced to file a Section 1983 suit *before* criminal proceedings have terminated. Many will be unwilling to do so, fearing that filing a civil suit will provoke prosecutors to seek greater penalties in ongoing criminal proceedings. Others will likely be counseled against filing a civil suit by their attorneys: Few lawyers would advise their client to make public statements about the evidence against them in a criminal proceeding, particularly if the client is considering testifying on their own behalf at a criminal trial. As a practical matter, the Second Circuit's statute of limitations rule is likely to deter criminal defendants from filing meritorious fabrication of evidence suits. Police officers and prosecutors may face a similar dilemma; they too could be forced in a civil suit to perform document discovery and provide depositions regarding the evidence presented in an ongoing criminal proceeding.

The rule adopted by the Second Circuit, moreover, will engender both significant uncertainty and protracted litigation. As Justice Scalia wrote, "any period of limitation is utterly meaningless without specification of the event that starts it running." *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 199 (1997) (Scalia, J., concurring in part and concurring in the judgment). Under the Second Circuit's rule, it is

unclear when the statute of limitations begins to run in any particular case. The exact point at which the criminal defendant knew, or should have known, that fabricated evidence was being used against him is a question of fact that could be litigated for years before a court reaches the merits of a Section 1983 claim. That is a problem not only for criminal defendants, but also for public officials, who will be unable to calculate with certainty when their Section 1983 liability draws to a close. *See Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 14 (2014) (limitations periods "embody a policy of repose, designed to protect defendants" and foster certainty about a defendant's liability (internal quotation marks omitted)); *see also Missouri* v. *McNeely*, 569 U.S. 141, 166 (2013) (Roberts, C.J., concurring in part and dissenting in part) (advocating in favor of straightforward rules to guide public officials).

Without clear guidance, courts will similarly struggle to determine the boundaries of the limitations period. Those courts that follow the Second Circuit's approach will be forced to engage in a fact-intensive inquiry to determine when the statute of limitations started to run in each case. *Cf. Novella* v. *Westchester Cty.*, 661 F.3d 128, 148 (2d Cir. 2011) (remanding for a "fact-dependent inquiry into" when each plaintiff knew or should have known of the fact triggering the statute of limitations). In some cases, this inquiry may need to be conducted as criminal proceedings continue in state court—an outcome the Court disfavors. *See Heck*, 512 U.S. at 484 (opting for an approach that "avoids parallel litigation" in federal and state court (internal quotation marks omitted)). Meanwhile, district courts will continue to reach their own, often contradictory, conclusions in light of

the circuit divide. *Compare Taylor* v. *City of Chicago*, No. 17-cv-03642, 2018 WL 4075402, at *5-6 (N.D. Ill. Aug. 27, 2018) (following Ninth Circuit's approach), *with Lewis*, 2017 WL 698682, at *3 (employing same approach as Second Circuit).

McDonough's case presents an ideal vehicle for the Court to resolve this important issue. He raised and preserved the question presented in the district court and court of appeals. *See* Pet. App. 8a, 47a-48a. Because the circuit split arose in McDonough's case, this case provides an opportunity to correct the Second Circuit's misstep before confusion deepens. *See* SUP. CT. R. 10(a). Moreover, in the decades since this Court's decisions in *Heck* and *Wallace*, a large majority of circuits have weighed in on the issue, making further percolation unwarranted.

In sum, this case presents the right vehicle for the Court to resolve the circuits' acknowledged, intractable, and consequential dispute over when the statute of limitations begins to run in a Section 1983 suit based on fabrication of evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 2018

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2017
No. 17-296-cv

EDWARD G. MCDONOUGH,

Plaintiff-Appellant,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Defendant-Appellee,

JOHN J. OGDEN, RICHARD MCNALLY JR., KEVIN MCGRATH, ALAN ROBILLARD, COUNTY OF RENSSELAER, JOHN F. BROWN, WILLIAM A. MCINERNEY, KEVIN F. O'MALLEY, DANIEL B. BROWN, ANTHONY J. RENNA,

Defendants.[*]

Appeal from the United States District Court
for the Northern District of New York.
No. 15-cv-1505 — Mae A. D'Agostino, *Judge*.

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[*] The Clerk is directed to amend the caption to conform to the above.

ARGUED: NOVEMBER 29, 2017

DECIDED: AUGUST 3, 2018

Before: JACOBS, RAGGI, and DRONEY, *Circuit Judges*.

Interlocutory appeal from a judgment of the United States District Court for the Northern District of New York (D'Agostino, *J.*) dismissing the Plaintiff-Appellant's claims under 42 U.S.C. § 1983. The Plaintiff-Appellant alleged that his right to due process had been violated because fabricated evidence was used against him in state criminal proceedings. He also alleged a malicious prosecution claim against the prosecutor. We conclude that his due process claim was untimely as it was filed beyond the applicable limitations period. We also conclude that the prosecutor was entitled to absolute immunity for the malicious prosecution claim. We therefore **AFFIRM** the judgment of the district court.

BRIAN D. PREMO, Premo Law Firm PLLC, Albany, NY, *for Plaintiff-Appellant*.

THOMAS J. O'CONNOR, Napierski, VanDenburgh, Napierski & O'Connor, LLP, Albany, NY, *for Defendant-Appellee Youel Smith*.

Andrew D. Bing, Deputy Solicitor General, Jennifer L. Clark, Assistant Solicitor General, *for* Barbara D. Underwood, Attorney General

of the State of New York, *for Defendant John G. Ogden*.

DRONEY, *Circuit Judge*:

Plaintiff-Appellant Edward G. McDonough, the former Democratic Commissioner of the Rensselaer County Board of Elections, was acquitted in New York state court of forging absentee ballots in a local primary election. He appeals from two subsequent decisions of the United States District Court for the Northern District of New York (D'Agostino, *J.*) dismissing his claims against Defendant-Appellee Youel Smith under 42 U.S.C. § 1983 related to that prosecution. He alleged (1) denial of due process based on fabricated evidence and (2) malicious prosecution. The district court determined that (1) McDonough's due process claim was untimely and dismissed it as to all Defendants[1] and (2) Smith, a Special District Attorney who prosecuted McDonough, was entitled to absolute prosecutorial immunity on McDonough's malicious prosecution claim and therefore dismissed that claim with respect to Smith.[2]

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[1] The Defendants are primarily individuals allegedly associated with either the purported fraudulent scheme that formed the basis for McDonough's prosecution or members of law enforcement responsible for his investigation and prosecution. McDonough has alleged conspiracies involving both types of defendants.

[2] McDonough's claims against Smith were brought against him in his official and individual capacities. The district court dismissed the former on the basis of Eleventh Amendment immunity. That decision is not challenged in this appeal. Thus, it is only the individual capacity claims that we address.

Pursuant to Federal Rule of Civil Procedure 54(b), the district court entered judgment as to Smith and certified the decisions dismissing the two claims against him for interlocutory appeal by McDonough.[3]

For the reasons that follow, we agree with the district court's conclusion that McDonough's due process claim was untimely, and thus barred by the applicable statute of limitations. We also agree with the district court that Smith is entitled to absolute immunity as to the malicious prosecution claim. We therefore **AFFIRM** the dismissal of those claims.

BACKGROUND

During the 2009 Working Families Party primary election in the City of Troy, New York, several individuals associated with the Democratic and Working Families Parties forged signatures and provided false information on absentee ballot applications and absentee ballots in order to affect the outcome of that primary. Those individuals then submitted the forged absentee ballot applications to McDonough. McDonough, as a commissioner of the Rensselaer County elections board, was responsible for processing those applications.[4] McDonough

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[3] Defendant John J. Ogden, a New York State Police Trooper who worked with Smith as an investigator in the criminal case against McDonough, has filed a brief in this court arguing that the district court correctly concluded that McDonough's due process claim was time-barred. Although this Court previously granted Ogden's motion to intervene for the purpose of seeking a stay pending a reconsideration motion in the district court, the judgment entered by the district court under Federal Rule of Civil Procedure 54(b) and authorization for interlocutory appeal only applied to Defendant-Appellee Smith.

[4] McDonough, as the Democratic Rensselaer County Elections Commissioner, is responsible for ensuring that all qualified

approved the forged applications, but subsequently claimed he did not know that they had been falsified.

The plot to influence the primary was eventually discovered. Defendant Richard McNally, the elected District Attorney for Rensselaer County, was disqualified from the ensuing investigation because certain of those allegedly involved in the scheme had worked on his prior campaign. The state court then appointed Smith as a Special District Attorney to lead the investigation and potential prosecution. McDonough claimed that Smith then engaged in an elaborate scheme to frame McDonough for the crimes by, among other things, fabricating evidence. This alleged scheme included using forged affidavits, offering false testimony, and using faulty DNA methods for analyzing materials used in processing the ballot applications, all despite Smith knowing that McDonough was innocent.

McDonough claims that Smith presented the fabricated evidence to a grand jury. The grand jury subsequently indicted McDonough on more than three dozen state law counts of felony forgery in the second degree and a similar number of counts of felony criminal possession of a forged instrument in the second degree. *See* N.Y. Penal Law §§ 170.10, 170.25. The case against McDonough proceeded to

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voters may exercise their right to vote. *See* Board of Elections, www.rensco.com/departments/board-of-elections/ (last visited Jun. 20, 2018). Part of the responsibilities of a Board of Elections, and by extension, a Commissioner, is to receive applications for absentee ballots and determine whether the applicants are qualified to vote. N.Y. Elec. Law § 8-402(1). McDonough, as an elections commissioner, was a full-time employee of Rensselaer County.

trial but ended in a mistrial. McDonough was then retried, again with Smith as the prosecutor. That trial ended in McDonough's acquittal on December 21, 2012.

On December 18, 2015, McDonough filed this action under 42 U.S.C. § 1983, claiming that the Defendants (including Smith) (1) had violated his right to due process by fabricating evidence and later using it against him before the grand jury and in his two trials and (2) were liable for malicious prosecution.

Several Defendants filed motions to dismiss McDonough's due process claim. They argued, in part, that it was barred by the applicable three-year statute of limitations because the allegedly fabricated evidence had been disclosed to McDonough, and his claim therefore accrued, well before the second jury acquitted him.[5]

In opposing the Defendants' motions, McDonough argued that because his fabrication of evidence claim was based on the actions of Smith, a prosecutor, it was analogous to a malicious prosecution claim, and therefore did not accrue until the second trial terminated in his favor. McDonough also contended that his due process claim did not accrue until the termination of the second trial under the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477

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[5] Although Smith filed a motion to dismiss McDonough's complaint, he did not argue that McDonough's due process claim was untimely Nonetheless, the district court concluded, as other Defendants had raised untimeliness issues as to the fabrication of evidence claim, that the claim was also untimely as to Smith. Plaintiff does not challenge that Smith may assert the untimeliness of that claim in this appeal.

(1994). He argued that his fabrication of evidence claim would challenge the validity of the pending criminal proceedings against him, and thus, under *Heck*, did not accrue until he was acquitted.

In two decisions, dated September 30, 2016 and December 30, 2016, the district court dismissed McDonough's due process claims against all Defendants as untimely and his malicious prosecution claim against Smith on the basis of absolute prosecutorial immunity.[6]

As to the due process claim, the district court reasoned that McDonough's claim was "based upon the fabrication of evidence" and it "accrued when he knew or should have known that such evidence was being used against him and not upon his acquittal in his criminal case." J. App. 155. As the district court indicated, McDonough's complaint had alleged "that all of the fabricated evidence was either presented at grand jury proceedings or during his two trials, all of which occurred" more than three years before he filed suit. J. App. 156.

The district court also concluded that Smith was protected by absolute immunity as to the malicious prosecution claim.

DISCUSSION

I. Standard of Review

"We review *de novo* the grant of a motion to dismiss, accepting all factual allegations in the

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[6] The district court also determined that McDonough's malicious prosecution claim was timely because it had not accrued until his acquittal. That claim is still proceeding in the district court as to other Defendants.

complaint as true and drawing inferences from those allegations in the light most favorable to the plaintiff." *Bascunan v. Elsaca*, 874 F.3d 806, 810 (2d Cir. 2017) (alterations and internal quotation marks omitted); *see also Deutsche Bank Nat'l Tr. Co. v. Quicken Loans Inc.*, 810 F.3d 861, 865 (2d Cir. 2015) ("We review *de novo* a district court's grant of a motion to dismiss, including its legal interpretation and application of a statute of limitations . . . .").

II. The Due Process Claim

McDonough argues that his due process claim is timely because he alleged that Smith fabricated evidence in order to file baseless charges against him, and thus his claim is most analogous to a malicious prosecution action, which does not accrue until favorable termination of the prosecution, here the verdict of acquittal. *See Poventud v. City of New York*, 750 F.3d 121, 131 (2d Cir. 2014). In the alternative, McDonough asserts (1) that his claim is timely in light of *Heck v. Humphrey*, and (2) that the use of fabricated evidence against him constituted a continuing violation that renders his claim timely.

We conclude that the nature of McDonough's due process claim is different from a malicious prosecution claim, and that it accrued when (1) McDonough learned that the evidence was false and was used against him during the criminal proceedings; and (2) he suffered a loss of liberty as a result of that evidence. Because both occurred more than three years prior to McDonough filing this action, we agree with the district court that

McDonough's due process claim is time-barred.[7] We also reject McDonough's additional arguments as to the due process claim.

a. The Accrual of § 1983 Actions for Fabrication of Evidence and Malicious Prosecution

The statute of limitation for claims brought under 42 U.S.C. § 1983 is generally "the statute of limitations for the analogous claim under the law of the state where the cause of action accrued." *Spak v. Phillips*, 857 F.3d 458, 462 (2d Cir. 2017). It is undisputed that the applicable statute here is New York's three-year limitations period for personal injury claims. *See Smith v. Campbell*, 782 F.3d 93, 100 (2d Cir. 2015) (applying three-year personal injury limitations period to retaliatory prosecution claim); *see also* N.Y.C.P.L.R. § 214(5) (personal injury statute of limitations).

"However, the time at which a claim . . . under [§] 1983 accrues is a question of federal law that is *not* resolved by reference to state law." *Spak*, 857 F.3d at 462 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)) (emphasis in original). Instead, federal "courts apply general common-law tort principles to determine the accrual date of a [§] 1983 claim." *Spak*, 857 F.3d at 462 (alterations and internal quotation marks omitted). It "is the standard rule that accrual occurs when a plaintiff has a complete and present cause of action, that is,

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[7] At times, McDonough characterizes the fabrication of evidence claim against Smith as a conspiracy to fabricate evidence with other Defendants. That does not affect our conclusion as to the accrual of that claim.

when the plaintiff can file suit and obtain relief." *Smith*, 782 F.3d at 100 (internal quotation marks omitted). Put other ways, an action accrues "when the wrongful act or omission results in damages," *id.*, and "once the plaintiff knows or has reason to know of the injury which is the basis of his action," *Veal v. Geraci*, 23 F.3d 722, 724 (2d Cir. 1994) (internal quotation marks omitted).

We next consider the accrual rules for the two types of claims that McDonough has brought against Smith in this case: fabrication of evidence and malicious prosecution.

Under the Fifth and Fourteenth Amendments' Due Process Clauses, individuals have "the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer . . . ." *Zahrey v. Coffey*, 221 F.3d 342, 349 (2d Cir. 2000). The forwarding by an investigating officer to a prosecutor of fabricated evidence, or in this instance, the alleged creation or use of such evidence by both investigating officers and the prosecutor, "works an unacceptable 'corruption of the truth-seeking function of the trial process.'" *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976)).

Applying our standard accrual rules, a fabrication of evidence claim accrues (1) when a plaintiff learns of the fabrication and it is used against him, *see Veal*, 23 F.3d at 724, and (2) his liberty has been deprived in some way, *see Zahrey*, 221 F.3d at 348. Because there is no dispute in this case that McDonough suffered a liberty deprivation because of that evidence when he was arrested and stood trial, we focus our attention on the first prong. *See id.*

The statute of limitations begins to run on a fabrication of evidence claim against law enforcement officials under § 1983 when the plaintiff has "'reason to know of the injury which is the basis of his action.'" *Veal*, 23 F.3d at 724 (quoting *Singleton v. New York*, 632 F.2d 185, 191 (2d Cir. 1980)). "The reference to 'know[ledge] of the injury' does not suggest that the statute does not begin to run until the claimant has received judicial verification that the defendants' acts were wrongful." *Id.* (second alteration in original).

In *Veal*, a police detective manipulated a lineup by arranging for the witness to view the criminal defendant (later the plaintiff in the § 1983 fabrication of evidence lawsuit) entering the police station in handcuffs prior to conducting the lineup. *Id.* at 723-24. However, at the time of the lineup, the defendant had already been arrested for the crime based on the same witness's identification of him from a prior photo array. *Id.* at 725. The evidence of the identification from the lineup was later used at trial and the defendant was convicted. *Id.* at 724. The Appellate Division of the New York Supreme Court reversed the conviction because of the use of the suggestive lineup and the resulting in-court identification. *Id.*

Veal brought his § 1983 due process claim within three years of the decision by the Appellate Division but more than three years after he had been sentenced following his trial. *Id.* We concluded that the statute of limitations had expired before the suit was instituted because Veal was made aware of the tainted lineup when its circumstances were disclosed before his trial (and he moved to suppress its use at

trial), more than three years before suit was brought. *Id.* at 724-25. The date of the reversal of the conviction by the Appellate Division was not the accrual date of the due process violation; rather it was as early as when the circumstances of the lineup were disclosed at the pretrial hearing, and certainly no later than the date of conviction and sentencing, because those later dates were when the liberty deprivation occurred based on the effect of the tainted evidence at trial. *Id.* at 725-26.[8]

We acknowledge that the Third, Ninth, and Tenth Circuits have held that the due process fabrication cause of action accrues only after criminal proceedings have terminated because those circuits have concluded that fabrication of evidence claims are analogous to claims of malicious prosecution, which require termination of the criminal proceeding in the defendant's favor before suit may be brought. *See Floyd v. Attorney Gen. of Pennsylvania*, 722 F. App'x. 112, 114 (3d Cir. Jan. 8, 2018); *Bradford v. Scherschligt*, 803 F.3d 382, 388-89 (9th Cir. 2015) ("To determine the proper date of accrual, we look to the common law tort most analogous to Bradford's claim. As we have explained, the right at issue... is the right to be free from [criminal] charges based on a claim of deliberately fabricated evidence. In this regard, it is like the tort of malicious prosecution, which involves the right to be

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[8] District courts in this Circuit have followed *Veal* and concluded that a § 1983 claim based on fabricated evidence "accrues when the plaintiff learns or should have learned that the evidence was fabricated and such conduct causes the claimant some injury." *Mitchell v. Home*, 377 F. Supp. 2d 361, 373 (S.D.N.Y. 2005)

free from the use of legal process that is motivated by malice and unsupported by probable cause.") (second alteration in original) (internal citation and quotation marks omitted); *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008) ("After the institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim. . . . Because the statute of limitations does not start running before the elements of a claim are satisfied, the statute of limitations for this due process claim cannot start until the plaintiff has achieved a favorable result in the original action."). We disagree with those decisions. Because the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the cause of action accrues. Indeed, the harm—and the due process violation—is in the *use* of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding.

We thus conclude that, under the circumstances here, the § 1983 action based on fabrication of evidence accrued when McDonough (1) learned of the fabrication of the evidence and its use against him in criminal proceedings, and (2) was deprived of a liberty interest by his arrest and trial. For McDonough, this was, at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial, after all of the prosecution's evidence

had been presented.[9] "[J]udicial verification that the defendants' acts were wrongful" is not required, and thus accrual did not have to await McDonough's acquittal. *Veal*, 23 F.3d at 724.

In contrast, we have long held that malicious prosecution claims brought pursuant to § 1983 do not accrue until the underlying criminal proceedings against the plaintiff terminate in his favor. *Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir. 2010). Favorable termination is an element of malicious prosecution under New York law and also for the Constitution-based tort. *Id.* A plaintiff therefore cannot have a complete cause of action unless and until the criminal proceedings against him terminate favorably.[10] Accordingly, the district court properly concluded that the malicious prosecution claims were timely.[11]

That McDonough alleged that a prosecutor, rather than a law enforcement officer, fabricated evidence does not delay the accrual of his due process claim until accrual of his malicious prosecution claim. The

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[9] McDonough does not allege that fabricated evidence was used against him in the second trial that was not presented in the first.

[10] The elements of a malicious prosecution claim require a plaintiff to establish that "(1) the defendant initiated a prosecution against [the] plaintiff, (2) without probable cause to believe the proceeding can succeed, (3) the proceeding was begun with malice and, (4) the matter terminated in plaintiff's favor." *Ricciuti*, 124 F.3d at 130. The elements are the same for the New York tort and the constitutional one. *See id ; Colon v. City of New York*, 60. N.Y.2d 78, 82 (1983)

[11] The district court, however, concluded that Smith was entitled to absolute immunity from the malicious prosecution claim. That decision is addressed later in this opinion.

constitutional right violated by fabricated evidence is the right not to be arrested or to face trial based on such evidence. *See Zahrey*, 221 F.3d at 348. That violation and its harm were complete when the fabricated evidence was used by Smith against McDonough in those ways. It matters not, in the circumstances here, whether it was Smith or a law enforcement officer who created and used the allegedly false evidence; whoever causes that deprivation of liberty is a proper defendant for this constitutional cause of action. But the defendant's role makes no difference when the claim accrues. The separate and distinct harm that malicious prosecution claims are designed to address afforded McDonough a remedy to the extent that he alleged that fabricated evidence was created to prosecute him maliciously and without probable cause.[12] *See id.* (discussing claim based on prosecutor's fabrication of evidence).

McDonough argues that, notwithstanding its date of accrual, his due process claim is timely as a result of the Supreme Court's decision in *Heck*, 512 U.S. at 486-87 (concluding that civil complaint must be dismissed in a malicious prosecution-type case if a judgment in favor of the plaintiff would "imply the invalidity of his conviction"). That argument, however, is foreclosed by the Supreme Court's subsequent decision in *Wallace*, 549 U.S. at 393-94. In *Wallace*, the plaintiff brought a false arrest claim under § 1983. The conviction following that arrest

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[12] As one district court in this Circuit aptly explained: "A right to a fair trial claim is *distinct* from a malicious prosecution claim." *Bailey v. City of New York*, 79 F. Supp 3d 424, 446 (E.D.N.Y. 2015) (emphasis added).

was reversed by the state appeals court because the arrest was without probable cause, thus invalidating a subsequent confession admitted at trial. *Id.* at 386-87. The Supreme Court held that the civil false arrest claim accrued at the time of the initial arrest and the ultimate reversal of the conviction was not necessary to complete the false arrest constitutional tort. *Id.* at 394. Even though the false arrest claim might impugn a *future* conviction, *Heck* did not delay its accrual date, and the civil action could proceed even though the criminal case had not been resolved at that time.[13] *Id.* at 393. Thus, the Court clarified that, "the *Heck* rule for deferred accrual is called into play only when there exists a conviction or sentence that has *not* been invalidated, that is to say, an outstanding criminal judgment." *Wallace*, 549 U.S. at 393 (internal punctuation and quotation marks omitted) (emphasis in original). McDonough was never convicted, so *Heck* is not "called into play." *Id.*

Finally, McDonough argues that his due process claim is timely because his "wrongful prosecution [constituted] a continuing violation," that only ceased on his acquittal. Appellant's Br. 50. We are not persuaded. As we have explained: "Characterizing defendants' separate wrongful acts as having been committed in furtherance of a conspiracy or as a single series of interlocking events does not postpone accrual of claims based on individual wrongful acts." *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1156 (2d

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[13] The Supreme Court in *Wallace* stated that there may be circumstances where the district court might exercise its discretion to stay the civil action until the criminal case is resolved, but that is not relevant here. *Wallace*, 594 U.S. at 393-94.

Cir. 1995) (internal quotation marks omitted). Smith allegedly fabricated evidence, then presented that evidence to a grand jury, and later used it at McDonough's trials. The cause of action accrued when McDonough became aware of the fabricated evidence, which was, at the latest, during the first trial. The continuation of the prosecution does not, by itself, constitute a continuing violation that would postpone the running of the statute of limitations until his acquittal.[14]

III. The Malicious Prosecution Claim

Prosecutors are protected by absolute immunity for their acts that are "intimately associated with the judicial phase of the criminal process" and their role as advocates, but they receive only qualified immunity for acts that are investigatory in nature. *Simon v. City of New York*, 727 F.3d 167, 171–72 (2d Cir. 2013) (internal quotation marks omitted). The district court concluded that Smith was entitled to absolute immunity from McDonough's malicious prosecution claim because even though McDonough's

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[14] We are also not persuaded by McDonough's reliance on the Supreme Court's recent decision in *Manuel v. City of Joliet, Ill.*, which held that a plaintiff (formerly a criminal defendant) may seek damages under 42 U.S.C. § 1983 concerning his pretrial detention on the ground that it violated the Fourth Amendment for the period of pretrial detention after his arrest. 137 S. Ct. 911, 914 (2017). That a claim under the Fourth Amendment may be based on events occurring after an arrest does not affect our conclusion that McDonough's due process claim accrued well before his acquittal, and the Supreme Court stated in *Manuel* that its recognition that the Fourth Amendment applies to a period after the arrest did not necessarily alter the accrual date of that and other causes of action, and left the question for the Courts of Appeals to resolve. *Id.* at 922.

complaint suggests that, at times, Smith was acting in an investigatory capacity, "the distinction between a prosecutor's investigative and prosecutorial functions is immaterial to a malicious prosecution claim, since prosecutors are generally immune from such claims." J. App. 204; *see also Shmueli v. New York*, 424 F.3d 231, 238 (2d Cir. 2005). We agree. Although prosecutors may be eligible only for qualified immunity when functioning in an investigative capacity, they are entitled to absolute immunity when acting as advocates for the state, such as initiating prosecutions or at trial. *See Zahrey*, 221 F.3d at 346 (holding, in § 1983 cases, that prosecutorial "[a]ctions taken as an advocate enjoy absolute immunity, while actions taken as an investigator enjoy only qualified immunity" (internal citation omitted)); *see also Shmueli*, 424 F.3d at 237 ("[T]he initiation and pursuit of a criminal prosecution are quintessential prosecutorial functions . . . ."). As the malicious prosecution claim relates only to Smith's prosecutorial function, it is barred by absolute immunity.[15]

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[15] McDonough also asserts on appeal that Smith's appointment as Special District Attorney was invalid under New York law and that the conduct McDonough was charged with in the indictment could not meet the elements of the various state criminal statutes. In order to strip Smith of his absolute prosecutorial immunity, McDonough would be required to show Smith proceeded despite a "clear absence of all jurisdiction" for the prosecution. *Barr v. Abrams*, 810 F 2d 358, 361 (2d Cir. 1987). He has not done so. Also, as to the claim that Smith was not properly appointed, the correct forum for such a claim would be in the New York courts. In *Working Families Party v. Fisher*, 23 N.Y.3d 539 (2014), the New York Court of Appeals held that the method for challenging the appointment of a special prosecutor is through a N.Y. C P.L.R.

CONCLUSION

McDonough's due process claim accrued when (1) the purportedly fabricated evidence was used against him and he had knowledge of that use, and (2) he was deprived of a liberty interest. Because that occurred more than three years before he filed suit, we **AFFIRM** the decision of the district court dismissing that claim. We also **AFFIRM** the decision of the district court that Smith was entitled to absolute immunity for the malicious prosecution claim.

Article 78 proceeding. McDonough did not pursue the Article 78 course to invalidate Smith's appointment. Rather, McDonough alleged in his complaint that he sought to have Smith disqualified by petitioning the County to file an action in the state courts to nullify Smith's appointment, and later filing a motion in his criminal case to dismiss the charges on the basis that Smith's appointment was unlawful. That motion was denied. As to the claim concerning the New York criminal statutes, the appropriate forum for challenging the application of the state criminal statutes to McDonough's alleged conduct was in McDonough's two state criminal trials, not during this subsequent civil action under § 1983. To the extent he argues that this should support his malicious prosecution claim, the argument does not affect Smith's absolute immunity for his prosecutorial conduct, as it is the heartland of such a protection. *See Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) (holding that absolute immunity protects prosecutors for their conduct "intimately associated with the judicial phase of the criminal process . . . .").

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 1:15-cv-01505
(MAD/DJS)

EDWARD G. MCDONOUGH,

Plaintiff,

v.

YOUEL C. SMITH, III, individually and as Special District Attorney for the County of Rensselaer, New York, a/k/a TREY SMITH; RICHARD J. MCNALLY, JR., individually and as Special District Attorney for the County of Rensselaer, New York; KEVIN B. MCGRATH; JOHN F. BROWN; WILLIAM A. MCINERNEY; JOHN J. OGDEN; KEVIN F. O'MALLEY; DANIEL B., BROWN; ANTHONY J. RENNA; ALAN T. ROBILLARD; THE COUNTY OF RENSSELAER, NEW YORK,

Defendants.

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Mae A. D'Agostini, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff Edward G. McDonough ("Plaintiff") commenced the instant action by filing a 174 page, 1220 paragraph complaint on December 18, 2015, asserting three causes of action pursuant to 42 U.S.C. § 1983 against eleven named defendants. *See* Dkt. No. 1. Currently before the Court are five motions to dismiss, filed separately by Defendants McInerney, O'Malley, Robillard, McNally, and jointly by John and Daniel Brown. *See* Dkt. Nos. 12, 40, 50, 56, 64. The Court will address Defendants Smith, Ogden, and the County's motions to dismiss in a subsequent order. *See* Dkt. Nos. 73, 95, 96, 97.

II. BACKGROUND[1]

Defendant Youel C. Smith III, also known as Trey Smith ("Defendant Smith"), was appointed special district attorney of Rensselaer County to prosecute alleged absentee ballot forgeries in the 2009 Troy city elections. Dkt. No. 1 at ¶¶ 24-25. Defendant Richard J. McNally, Jr. ("Defendant McNally"), at the relevant times of this action, was employed as the district attorney of Rensselaer County. *Id.* at ¶ 27. Defendant William A. McInerney was serving as Troy City Clerk and was active in the recruitment of voters for the Democratic Party in Rensselaer County. Dkt. No. 12-2 at 2. Defendant John Brown is a Democratic city councilman in Troy, New York, and his brother, Daniel, served as his campaign manager during the relevant portions of this action. *See* Dkt. No. 40-3 at 3. Defendant Kevin McGrath is the brother of a State Supreme Court Justice and is active in the Rensselaer County Democratic party. Dkt. No. 1 at ¶ 3. Defendant Kevin O'Malley is an employee at the Rensselaer County Board of Elections. *Id.* at ¶ 10. Defendant John J. Ogden is an investigator for the Rensselaer County District Attorney's office. *Id.*

At all relevant times of this action, Plaintiff was employed by Rensselaer County as a full-time Democratic Commissioner of the Rensselaer County Board of Elections (the "Board of Elections"). Dkt. No. 1 at ¶ 23. The general allegations in this case surround an alleged scheme to forge and submit false

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[1] The following factual background is taken from Plaintiffs' verified complaint. Any statements contained herein are treated merely as allegations and not as statements of fact.

applications for absentee ballots ("AAB") and then file the subsequently forged absentee ballots ("AB").

An AAB is a simple, single page document that must be signed and completed by the voter or his agent before it can be filed with the Board of Elections. *Id.* at ¶ 101. Once an AAB is completed, signed and filed, an AB and an AB envelope is mailed to the voter or to the voter's AB agent, if one is designated. *Id.* at ¶ 102. The AABs require the voter to list a reason for why he or she is eligible to vote absentee ("excuses"). *Id.* at ¶ 2.

In the summer of 2009, Defendant McGrath announced that he was running to take Democratic control of the Working Family Party ("WFP") line for the City of Troy elections. *Id.* at ¶ 51. To obtain this end, Defendant McGrath approached several people that were enrolled in the WFP, including Marc Welch and Jennifer Taylor. *Id.* at ¶ 52. Defendant McGrath allegedly had those WFP members sign an AAB without completing the remainder of the form. *Id.* at ¶ 53. Thereafter, he completed these AABs with false AB names and excuses, filed them, and obtained the AB for those voters. *Id.* at ¶ 54. After receiving the ABs, Defendant McGrath and/or others falsely voted with those ABs in forged AB envelopes. *Id.* at ¶ 56. On August 24, 2009, Defendant McGrath brought the AAB signed for by Jennifer Taylor to Plaintiff at the Board of Elections offices. *Id.* at ¶ 57. Defendant McGrath told Plaintiff the excuse to list on Ms. Taylor's AAB, and Plaintiff thereafter wrote down that excuse and filed the AAB. *Id.* at ¶ 58.

On one or more occasions prior to September 10, 2009, Defendant McInerney and Anthony DeFiglio sought to have public housing WFP residents sign

AABs without completing the application, discussing their eligibility to vote by AB, or naming an AB agent. *Id.* at ¶¶ 67-68. Defendant McInerney, Mr. DeFiglio, and Gary Galuski told some voters that signing an AAB "was a new way to vote" and that an AB would be returned to them. *Id.* at ¶ 70. Defendant McInerney, John Brown, and Dan Brown then completed these AABs with false names and excuses and filed them with the Board of Elections. *Id.* at ¶ 72. Again on September 12, 2009, Defendant McInerney, John Brown, Dan Brown, and several others had multiple WFP members in public housing sign incomplete AAB forms. *Id.* at ¶¶ 81-90.

On September 10, 2009, Defendants John or Dan Brown filed approximately thirteen false or forged AABs with the Board of Elections. *Id.* at ¶¶ 74-76. On September 14, 2009, John Brown brought approximately 35 AABs to Plaintiff at the Board of Elections for filing. *Id.* at ¶¶ 115-16. Plaintiff reviewed these AABs and discovered that thirteen of them were not completed and signed. *Id.* at ¶ 122. Plaintiff set aside five AABs that did not name an AB agent and told John Brown that the AB would be mailed directly to those voters. *Id.* at ¶ 123. John Brown then made a phone call and reported to Plaintiff that he had received the names that the voters gave as AB agents. *Id.* at ¶¶ 124-131. After this phone call, Plaintiff wrote those names on the AABs and also filled in missing excuses where John Brown told him to. *Id.* at ¶¶ 132-137. At John Brown's direction, Plaintiff delivered these ABs to Defendant McInerney. *Id.* at ¶¶ 143-145. Defendant McInerney thereafter forged each of the ABs that were delivered to him. *Id.* at ¶ 151. These ABs were

delivered by Michael LoPorto to Sarah Couch, who filed them with the Board of Elections on September 15, 2009. *Id.* at ¶¶ 156-160.

On or after September 15, 2009, Robert Mirch, who was running as a Republican for the Rensselaer County Legislature in the 2009 election, obtained the absentee voter master list summary from the Board of Elections and identified the individuals named in AABs and their agents. *Id.* at ¶ 161. A private investigator thereafter obtained affidavits from approximately 35 voters who stated that their AABs were falsely completed or forged and that their ABs were forged. *Id.* at ¶¶ 162-63. Some of these voters identified or described Defendants McGrath, McInerney, John Brown, Dan Brown, and DeFiglio as the individual who had them sign their AABs. *Id.* at ¶¶ 164-65.

On September 23, 2009, Christian Lambertsen commenced an action to invalidate the ABs filed by democratic operatives in the WFP (the "*Lambertsen* action"). *Id.* at ¶ 180. Soon thereafter, John Brown asked several individuals in the WFP, including Plaintiff, to meet him the following day to discuss the *Lambertsen* action. *Id.* at ¶¶ 184-187. The purpose of this meeting was to ask the WFP to issue a press release stating that any accusations of voter fraud were without merit. *Id.* at ¶¶ 188-90. Although Plaintiff attended this meeting, he did not know who forged the ABs. *Id.* at ¶ 192.

Shortly after the AB forgery was discovered, Defendant McInerney drove to Defendant McNally's home to ask what attorney he should hire, deliberately avoiding talking on the telephone for fear of being overheard. *Id.* at ¶ 213. Defendant

McInerney retained the attorney recommended by McNally. *Id.* at ¶ 215. Defendant McInerney allegedly threw his cell phone in the river at his attorney's advice in order to destroy evidence and evade subpoena. *Id.* at ¶ 216.

On September 28, 2009, Mirch held a press conference to ask for a federal investigation into the AB forgery. *Id.* at ¶ 222. On that same day, Defendant McNally disqualified his office from investigating or prosecuting any case related to the AB forgery. *Id.* at ¶ 229. In an off-the-record conference with County Court Judge Robert Jacon and the attorney from the *Lambertsen* action, Defendant Smith was appointed as special prosecutor for any further criminal action related to the 2009 AB forgery. *Id.* at ¶ 229. The County Court issued an order of disqualification "based on the speculation of politics and the appearance of impropriety." *Id.* at ¶ 232. Defendant McNally failed to make a formal motion for disqualification of himself or his office. *Id.* at ¶ 230. However, Plaintiff has produced a letter dated September 18, 2009, which was purportedly sent by Defendant McNally as a request for the appointment of a special prosecutor. *Id.* at ¶ 231. At the time of Defendant McNally's disqualification, only Defendant McGrath and DeFiglio were publicly named as being involved in the AB forgery. *Id.* at ¶ 236. In an affidavit dated July 7, 2011, Defendant McNally stated the following reasons for his disqualification:

"(a) McInerney had worked on his 2007 campaign; (c) [sic] *DeFiglio* had done campaign work with McInerney in the past; (d) he had contact with *James Welch* during his 2007 campaign; and, (b) [sic] he

believed that [Brandt] Caird worked on his 2007 campaign but did not know whether [Tom] Aldrich did." *Id.* at ¶ 238.

Prior to October 1, 2009, Defendant Smith allegedly told Defendants McInerney and John Brown that they would not be prosecuted for the AB forgery. *Id.* at ¶ 266. Thereafter, in late October or early November of 2009, Defendant Smith "leaked to the press" that Plaintiff was the primary target for the AB fraud prosecution. *Id.* at ¶ 267.

At an October 1, 2009 hearing for the *Lambertsen* action, testimonial and documentary evidence implicated Defendant McGrath and DeFiglio by name in the AB forgery. *Id.* at ¶ 271. After the hearing, Defendant Smith "took possession of all the falsified/forged AB documents produced or introduced into evidence." *Id.* at ¶ 270.

Defendants Smith and McNally talked about the AB forgery case after Defendant McNally disqualified himself from the matter. *Id.* at ¶ 300. Specifically, on or about "January 11, 2010, May 19, 2010 and November 2, 2010, the [New York State Police] laboratory sent McNally its DNA reports regarding AB documents at the request of [Defendant] Smith." *Id.* at ¶ 302.

Starting upon his appointment on September 28, 2009, Defendant Smith was actively engaged in the investigation for the alleged AB forgery case, including the interrogation and questioning of witnesses. *Id.* at ¶¶ 322-34. Defendant Smith requested that the New York State Police use their "new" DNA extraction methods to retrieve samples off of the forged AB envelopes. *Id.* at ¶ 328. These

reports indicated that Plaintiff's DNA was found on three of the AB envelopes. *Id.* at ¶ 329.

Plaintiff alleges that, through this investigation, Defendant Smith had sufficient evidence to prosecute Defendants McGrath, McInerney, and DeFiglio for the AB forgery. *Id.* at ¶ 335. Specifically, Defendant Smith obtained numerous forged AB documents and the testimony of more than 50 witnesses, many of whom implicated Defendant McInerney in the forgery scheme. *Id.* at ¶ 336. Rather than follow this evidence, Defendant Smith targeted Plaintiff for prosecution in the forgery case. Herein lies the alleged basis for the instant action; that the Defendants, working in concert, actively conspired to initiate a scapegoat prosecution against Plaintiff in order to shift the negative attention and criminal charges away from the other Defendants, who were all democratic party operatives. *Id.* at ¶¶ 343-45. Plaintiff contends that Defendant Smith

> pretentiously adopted and pursued a preposterous prosecution theory he knew was wrong; buried crucial testimony of DeFiglio and other witnesses; did not seek readily available evidence or the truthful cooperation of any perpetrator; accepted the self-serving incredible false assertions of many suspects implicated in the crimes; immunized or gave extraordinary favorable cooperation agreements to many suspects implicated in the crimes; purposely ignored material evidence; and fabricated false evidence against McDonough.

Id. at ¶ 345. Defendant Smith allegedly engaged in these actions in furtherance of the conspiracy to

avoid convicting Defendants McGrath, John Brown, and McInerney, when there was otherwise sufficient evidence to convict. *Id.* at ¶¶ 347-51.

B. Lack of Prosecution Against Defendants

The alleged inadequacies of Defendant Smith's investigation into the other Defendants for the AB forgery include the following; (1) the photograph shown to voters to identify Defendant McInerney was a 20 year old photo, which did not accurately reflect his current appearance; (2) photographs of Defendants John Brown, Dan Brown, and other democratic operatives were not shown to voters; (3) several key democratic party operatives, including Defendant Renna and Robert Martiniano, were not interviewed for the investigation; (4) certain witnesses were not specifically asked questions about Defendant McInerney's involvement in the AB forgery; (5) the forged AB documents purportedly signed by Defendant McInerney were not examined by a handwriting expert; (6) when presented with significant evidence that Defendant McInerney had participated in AB fraud in the 2007 and 2008 elections, Defendant Smith stated that he did not have authority to prosecute those actions. *Id.* at ¶¶ 364-380, 400, 487, 492-500.

James Welch, Brandt Caird, and Sarah Couch, individuals who were involved in the AB forgery, retained attorneys and refused to speak with Defendant Smith absent an immunity agreement. *Id.* at ¶¶ 409-10. In October or November of 2009, Couch and Caird were given promises of non-prosecution in return for their truthful testimony. *Id.* at ¶ 411. In their depositions, Couch and Caird admitted that they allowed John Brown to falsely

write their names as AB agents on several AABs. *Id.* at ¶ 422. Further, Couch stated that she was asked to file the ABs, but did not know that they were forged. *Id.* at ¶¶ 423-25.

On or prior to November 13, 2009, Defendant Smith gave a promise of non-prosecution to Aldritch, an individual who allegedly assisted Defendants McInerney and Dan Brown in getting voters to sign AABs, and who was named as AB agent on 19 of the falsified AABs. *Id.* at ¶¶ 432-33. In a sworn statement, Aldritch denied committing any wrongdoing in connection with the AB forgeries. *Id.* at ¶ 434-35. Several others who were allegedly involved in the forgery professed their innocence, and Defendant Smith took these individuals' statements as true and did not conduct any further investigations into their actions. Defendant O'Malley, who was present in Plaintiff's office when the fraudulent AB envelopes were delivered to Plaintiff, was not asked to give a sworn statement about this account or provide a detailed statement after his general denial of the events. *Id.* at ¶¶ 463-70.

In contrast to the non-confrontational approach of questioning the above-mentioned witnesses, Defendant Smith had Defendant Ogden interview Plaintiff twice on November 19, and December 7, 2009, gave him *Miranda* warnings, and took a sworn, written deposition on both occasions. *Id.* at ¶ 472.

In August of 2010, Defendant Renna allegedly called DeFiglio and "told him that McInerney wanted him to know that if he did not talk to the [police] again it would all be over soon and 'they' would get him an attorney and *'it would all go away.'*" *Id.* at

¶ 503. DeFiglio reported this call to the police, but Defendant Smith did not question Defendant Renna about this apparent witness tampering. *Id.* at ¶¶ 505-06. On November 6, 2009, DeFiglio completed a written sworn statement, which, in essence, contains the following information:

> (a) the AB forgery was committed by the [democratic party operatives] as part of a scheme to falsely vote AB of public housing voters; (b) [John] Brown and McInerney were the primary culprits; (c) [DeFiglio] had assisted McInerney on a few occasions in September 2009; (d) McInerney had possession of all the signed but incomplete AAB that were obtained; and (e) the same scheme of falsely voting AB was perpetrated by DeFiglio, McInerney, Renna and other [democratic party operatives] for more than 25 years.

Id. at ¶ 534; *see also* Dkt. No. 1-1 at 10-12. In this written statement, DeFiglio states that "there is no possible way that the Democratic Commissioner of the [Board of Elections], Ed McDonough, could not have known what was happening." Dkt. No. 1-1 at 12.

From 2009 through 2011, Defendant Smith told officials in the New York State Police that Defendants McInerney and John Brown could not be prosecuted because the evidence against them "was not legally sufficient to corroborate the testimony of DeFiglio or any accomplice or co-conspirator . . . ." *Id.* at ¶ 573.

In an interview on January 27, 2010, Defendant Smith met with Plaintiff to discuss the AB forgery case. The interview started off with Defendant

Smith professing animosity toward Plaintiff's father, the Democratic Party Chair, who had allegedly "turned his back" on Defendant Smith's ambitions to run for County District Attorney. *Id.* at ¶¶ 581-83. When Plaintiff attempted to tell Defendant Smith his recollection of what happened during the AB forgery, Defendant Smith responded that "he was going to 'fuck' [Plaintiff] like his father did him in the past and 'if you don't tell me anything more, the next time we speak will be at a Grand Jury.'" *Id.* at ¶ 585. Plaintiff did not have an attorney present at this meeting. *Id.* at ¶ 586.

After this meeting, Defendant Smith telephoned Defendant McGrath's attorney and offered his client immunity for "anything of value." *Id.* at ¶ 609. Defendant Smith contacted Defendant McGrath's attorney approximately four times between that meeting and March 2, 2010. *Id.* at ¶ 611. On March 12, 2010, Defendant McGrath executed a written cooperation agreement. *Id.* at ¶ 616. In a written deposition on March 22, 2010, Defendant McGrath implicated Plaintiff in the AB forgery scheme. *Id.* at ¶¶ 617-22. Plaintiff contends that this statement was patently false and contradicted by substantial evidence in the record. *Id.* at ¶ 623.

C. Grand Jury Proceeding

In September of 2010, Defendant Smith commenced a grand jury proceeding against Plaintiff and LoPorto. *Id.* at ¶ 708. Despite Defendant Smith stating in his application for DNA testing of the AB envelopes that "the AB forgery was committed in conspiracy by McGrath, [John] Brown, McInerney and other, including [Plaintiff]," no conspiracy charges were brought before the grand jury. *Id.* at

¶¶ 710-11. The evidence presented against Plaintiff at the grand jury proceedings consisted of several witness' testimony and the discovery of Plaintiff's DNA on three AB envelopes. *Id.* at ¶ 714. The press was informed that Plaintiff was the lead subject in the grand jury proceeding and his indictment was imminent. *Id.* at ¶ 709. Plaintiff refused to enter a guilty plea despite several requests from Defendant Smith to do so. *Id.* at ¶ 716. Plaintiff also expressed his intent to testify on his own behalf at the grand jury proceeding. *Id.* at ¶ 724. After this, Defendant McNally contacted Plaintiff and attempted to get him to change his attorney. *Id.* at ¶¶ 726-33. Plaintiff ultimately did not testify at the grand jury. *Id.* at ¶ 739.

On or about December 8, 2010, Defendant McGrath testified before the grand jury. *Id.* at ¶ 748. Essentially, he stated "that he witnessed McDonough write false Excuses on the Dickenson and/or Taylor AAB and on another date overheard McDonough talking with [John] Brown about names he intended to write as AB Agents on about thirty-five (35) AAB . . . ." *Id.* at ¶ 749. Defendant McGrath did not mention that Defendant O'Malley was in the room with him at Plaintiff's office. *Id.* at ¶ 751. Plaintiff contends that this allegedly "false testimony set the foundation for the false testimony of Ogden, [John] Brown and O'Malley." *Id.* at ¶ 757.

Defendant Ogden testified before the grand jury that he reviewed the handwriting on the forged AABs and concluded that they were all falsified by the same person. *Id.* at ¶ 758. Defendant Ogden "later admitted at trial that his purported law

enforcement expert testimony before the Grand Jury was not correct and a mistake." *Id.* at ¶ 768.

Defendant O'Malley initially testified before the grand jury that he wrote excuses on several of the AABs. *Id.* at ¶¶ 769-70. He stated that the person who gave him those excuses was "'probably the candidate' who got that information from 'probably a [democratic committee] operative.'" *Id.* at ¶ 772. In emails between Defendant Smith and Defendant Ogden's and O'Malley's attorney, Defendant Smith expressed his concern that Defendant O'Malley had committed perjury in his testimony. *Id.* at ¶¶ 774-77; *see also* Dkt. No. 1-1 at 23-24. After this, on December 15, 2010, Defendant Smith "sent O'Malley's attorney an e-mail threatening to prosecute him for AB for AB forgery and warning that it made no sense for him to protect his boss." Dkt. No. 1 at ¶ 781. That same day, Defendant O'Malley returned to the grand jury and testified that "on September 14, 2009, his boss McDonough called him into his office and told him to make-up Excuses and write them on those eight (8) AAB, so he did." *Id.* at ¶ 783. At trial, O'Malley admitted that Defendant Smith called him at his home the night before this change in his testimony. *Id.* at ¶ 784.

D. The Indictment and Trials

On January 28, 2011, Plaintiff was charged by indictment with 38 counts of felony forgery in the second degree and 36 counts of felony criminal possession of a forged instrument in the second degree. *Id.* at ¶ 809. In the grand jury proceeding, Defendant Smith presented either testimony or an affidavit from each voter listed on the falsified ABs.

Id. at ¶ 813. Defendant Smith prepared and notarized the affidavits of those individuals who did not testify. *Id.* at ¶ 815. At trial, two of those voters testified that the signature on their purported affidavit was not genuine. *Id.* at ¶ 816; *see also* Dkt. No. 1-1 at 26-30.

On February 24, 2011, Plaintiff unsuccessfully moved to disqualify Defendant Smith as special prosecutor. Dkt. No. 1 at ¶¶ 859-62. On June 13, 2011, Plaintiff filed an unsuccessful motion to dismiss the criminal charges on the basis that Defendant Smith's appointment was unlawful. *Id.* at ¶¶ 869-71. This motion laid out Plaintiff's entire argument that the Defendants had engaged in a scapegoat prosecution against him. *Id.* at ¶ 904. After this motion became public news, "Martiniano came forward and disclosed in a sworn statement to a private investigator that the [police] never interviewed him, [John] Brown and McInerney told him they were going to use the AAB gathered on September 14, 2009 to forge signatures onto AB envelopes and McNally told him that he should not contact the [police] or [Defendant] Smith and disclose the facts he know about the matter because 'it will all be over soon.'" *Id.* at ¶ 908. Defendant Smith took no action against Defendants McInerney or John Brown as a result of this statement. *Id.* at ¶ 913.

On June 10, 2011, Defendant Smith moved to compel the handwriting samples from Plaintiff and LoPorto. *Id.* at ¶ 880. Defendant Robillard was the forensic document examiner hired to perform this comparison. *Id.* at ¶ 884. In his request for a handwriting comparison, Defendant Smith detailed

the testimony against Plaintiff in a letter to Defendant Robillard. *See* Dkt. No. 1-1 at 35-37. Also, Defendant Ogden testified that he "talked to Robillard about the theory of prosecution and evidence" before he issued his report. Dkt. No. 1 at ¶ 1137. Defendant Robillard gave his expert testimony that it was Plaintiff's handwriting on nearly all of the falsified AABs. *Id.* at ¶ 897. He made this initial findings without comparing the handwriting of John Brown, Dan Brown, Defendant McGrath, or other suspects. *Id.* at ¶ 1145. Defendant Robillard was paid approximately $100,000 and was instructed by Defendant Smith to not conduct an ink analysis on several of the falsified AABs. *Id.* at ¶¶ 898, 902, 1152.

In April of 2011, Plaintiff contacted the U.S. attorney's office and requested an FBI investigation into his allegedly unlawful prosecution. *Id.* at ¶ 929. Thereafter, in May of 2011, special agent McDonald was assigned to conduct an investigation into this matter. *Id.* at ¶¶ 930-31. Between May 25 and August 4, 2011, the New York State Police conducted an independent investigation into this matter. *Id.* at ¶ 944. That investigation gathered sufficient evidence against Defendant McInerney for the forgery of approximately 50 of the AABs that appeared to be forged in his handwriting. *Id.* at ¶ 947. Through this investigation, the FBI confirmed that Defendant Smith's "statement to the [police] that McInerney and [John] Brown could not be prosecuted was not true because . . . the voter testimony and forged AB documents were sufficient to corroborate the testimony of any accomplice . . . ." *Id.* at ¶ 942.

On August 8, 2011, Defendant McInerney was arrested on several felony complaints for AB forgeries in 2007 and 2008 elections. *Id.* at ¶ 993. In July of 2011, Defendant Smith had Defendant McNally disqualify himself from prosecuting the actions surrounding the 2007 and 2008 elections. *Id.* at ¶ 1001. Prior to Defendant McInerney entering into a cooperation agreement, he met several times with Defendant Smith outside of the presence of the New York police or the FBI. *Id.* at ¶¶ 1003-04. Defendant McInerney pled guilty to one felony count and was sentenced to a 90 day work order. *Id.* at ¶ 971; Dkt. No. 12-2 at 3.

In two written deposition dated October 20 and November 9, 2011, Defendant Renna made statements confessing his involvement in the forgery scheme and implicating Plaintiff. Dkt. No. 1 at ¶¶ 1022-30. On December 5, 2011, Defendant Renna executed a cooperation agreement, pursuant to which he was required to plead guilty to one felony and sentenced to 200 hours of community service. *Id.* at ¶ 1033. Defendant Renna thereafter testified in a grand jury proceeding against several others involved in the forgery, again implicating Plaintiff. *Id.* at ¶¶ 1034-35.

On December 6, 2011, Defendant John Brown entered into a cooperation agreement, pursuant to which he was required to provide complete and truthful cooperation in return for a guilty plea to one felony count with up to six months incarceration and five years probation. *Id.* at ¶ 1056. Thereafter he gave a written sworn statement and testified before the grand jury as follows:

> (a) he saw McGrath g[i]ve [Plaintiff] an AAB and what seemed to be a false Excuse for an older voter and [Plaintiff] the wrote information on that AAB; (b) he was in [Plaintiff's] office for about forty (40) minutes during which he saw the AAB he brought to the [board of elections] sitting on [Plaintiff's] desk; (c) he saw [Plaintiff] writing on documents but could not say for sure that they were those AAB; and, (d) he saw O'Malley come in and out of the office but did not recall him sitting at a desk or writing on any AAB.

Id. at ¶ 1059. Plaintiff alleges that Defendant Smith met with John Brown before he issued this statement to ensure that it was consistent with the other Defendants' sworn testimony. *Id.* at ¶ 1061.

Plaintiff contends that Defendants McGrath, John Brown, O'Malley, McInerney, Renna, Robillard, Ogden, and Dan Brown each gave false testimony at trial that was consistent with their previous false grand jury testimony and written statements. *Id.* at ¶ 1094. In regards to Defendant Renna's testimony, at the second trial against Plaintiff, the court ordered that his testimony be stricken in its entirety due to its apparent falsity and he was directed to leave the courthouse immediately. *Id.* at ¶ 1125. Despite this, Defendant Smith asked Renna to be sentenced to a work order in accordance with his cooperating agreement. *Id.* at ¶ 1162.

Plaintiff alleges that the County and Defendant McNally's failure to take action to disqualify Defendant Smith from the prosecution contributed to his injuries in this action. *Id.* at ¶ 1181. Plaintiff was indicted on January 28, 2011 and endured two

trials before he was acquitted on December 21, 2012. Dkt. No. 1 at ¶¶ 1199-1200. Plaintiff also suffered emotional and reputational injuries and amassed significant attorneys fees for his criminal defense. *Id.* at ¶¶ 1204-08.

III. DISCUSSION

A. Standard of Review

1. Rule 12(b)(6)

A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the party's claim for relief. *See Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002)); *see also Sutton ex rel. Rose v. Wachovia Secs., LLC*, 208 Fed. Appx. 27, 29-30 (2d Cir. 2006) (noting that, on a motion to dismiss, a court may take judicial notice of documents filed in another court).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," see FED. R. CIV. P. 8(a)(2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[,]'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *id.* at 555 (citation omitted), and present claims that are "plausible on [their] face," *id.* at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly*, 550 U.S. at 558, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the [ ] complaint must be dismissed[,]" *Id.* at 570.

B. General Arguments

While the Defendants are each separately represented and most have moved independently to dismiss Plaintiff's complaint on numerous grounds, several of the arguments are not specific to any individual Defendant and, thus, will be considered before addressing any of the Defendant-specific arguments.

1. Local Rule 7.1

Northern District of New York Local Rule 7.1(a)(1) states that "[n]o party shall file or serve a memorandum of law that exceeds twenty-five (25) pages in length, unless that party obtains leave of the judge hearing the motion prior to filing." Further, Rule 7.1(b)(3) states that "[t]he Court shall not consider any papers required under this Rule that are not timely filed or are otherwise not in compliance with the Rule unless good cause is shown."

In opposition to two of the pending motions, Plaintiff filed memorandum that vastly exceed the 25 page limit. In response to Defendant McInerney's motion, Plaintiff's opposition is 70 pages long, and in response to the Brown Defendants' motion, it is 66 pages with an attached "supplement addendum" that contains an additional 41 pages of factual allegations. *See* Dkt. Nos. 36, 60, 60-2. While these responses grossly exceed the local rule page limit, upon closer examination, the Court need not strike the entire opposition. In the 70 page opposition to Defendant McInerney's motion, the first 39 pages of Plaintiff's memorandum contains a general restatement of the factual allegations contained in his complaint. *See* Dkt. No. 36. In the 66 page opposition to the Brown Defendants' motion, the first 16 pages generally restates the factual allegations in the complaint, and the following eight pages discuss the facts as alleged in the Brown Defendants motion, pointing to allegations in the complaint to refute those facts. *See* Dkt. No. 60. Moreover, the "supplement addendum" to Plaintiff's opposition

consists entirely of additional factual allegations. *See* Dkt. No. 60-2.

The Court does not condone Plaintiff's disregard for the Local Rules page limits for motion practice, especially in light of his failure to seek an exception to the rule. To the extent that they provide additional information not contained in the complaint, the above-mentioned factual sections of Plaintiff's excessive responses to Defendants' motions will be stricken from being considered in ruling on the respective motions. Significantly, Plaintiff has not moved to amend his complaint to allege any additional facts, and opposition memorandum of law are not the proper place to include such facts. When the excessive factual sections are stricken from Plaintiff's oppositions, his memorandum come much closer to the page limits set by the Local Rules. The Court orders that Plaintiff is to strictly abide by the Local Rules' page limits in any further submissions on dispositive motions.

2. Rule 8

With respect to the pleading requirements under Rule 8 of the Federal Rules of Civil Procedure, the Second Circuit has stated as follows:

> Rule 8 provides that a complaint "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The statement should be plain because the principal function of pleadings under the Federal Rules is to give the adverse party fair notice of the claim asserted so as to enable him to answer and prepare for trial. *See, e.g., Geisler v. Petrocelli*,

> 616 F.2d 636, 640 (2d Cir. 1980); 2A Moore's Federal Practice ¶ 8.13, at 8-61 (2d ed. 1987). The statement should be short because "[u]nnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1281, at 365 (1969).
>
> When a complaint does not comply with the requirement that it be short and plain, the court has the power, on its own initiative or in response to a motion by the defendant, to strike any portions that are redundant or immaterial, *see* Fed. R. Civ. P. 12(f), or to dismiss the complaint. Dismissal, however, is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised. *See Gillibeau v. City of Richmond*, 417 F.2d 426, 431 (9th Cir. 1969). When the court chooses to dismiss, it normally grants leave to file an amended pleading that conforms to the requirements of Rule 8. *See generally* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1281, at 366-67; 2A Moore's Federal Practice ¶ 8.13, at 8-81 to 8-82 n.38.

Salahuddin v. Cuomo, 861 F.2d 40, 41-42 (2d Cir. 1998).

Plaintiff's complaint is a 1220 paragraph, 174 page document with 50 additional pages of attached exhibits. *See* Dkt. No. 1. While this is undoubtedly a

voluminous pleading, Plaintiff's allegations span an approximately four year period and implicate ten separate defendants and countless other individuals who played a role in the underlying events giving rise to this action. While there are several repetitious arguments throughout the complaint, it is essentially written in concise separate paragraphs that each provide additional relevant information. Moreover, with a few exceptions, the complaint largely avoids the oftentimes-fatal pitfall of pleading baseless legal conclusions and unsupported hypotheticals. Significantly, Plaintiff's three causes of action are well pled and succinctly stated in the final four pages of his complaint. *See* Dkt. No. 1 at ¶¶ 1209-1220. Further, each Defendant that has responded to the complaint has been able understand the allegations stated therein enough to present colorable arguments and defenses in opposition. Thus, it cannot be said that Defendants are so utterly confused or overwhelmed by Plaintiff's complaint that they are unable to form a reasonable response to it. If Plaintiff had opted to state a less-detailed version of the alleged events giving rise to his claims, Defendants would undoubtedly argue that Plaintiff had failed to present enough factual support to sustain his action under Rule 12(b)(6). The existence of a conspiracy, especially a conspiracy spanning numerous years and encompassing a multitude of actors, necessarily requires significant factual allegations to provide the requisite background to support any related claims. Accordingly, the Court finds that Plaintiff's complaint, although voluminous, complies with the requirements of Rule 8 and Defendants McInerney,

McNally, Ogden, and Rensselaer County's motions to dismiss are denied on this ground.

3. Statute of Limitations

The statute of limitations applicable to Section 1983 claims is the "statute of limitations applicable to personal injuries occurring in the state in which the appropriate federal court sits." *Dory v. Ryan*, 999 F.2d 679, 681 (2d Cir. 1993) (citations omitted). In New York State, the statute of limitations for personal injury claims is three years. N.Y. Civ. Prac. L. § 214(5); *see also Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir. 2002) (holding that Section 1983 claims arising in New York are subject to a three-year statute of limitations). Further, accrual begins when the plaintiff "knows or has reason to know of the injury that is the basis for his action." *Pauk v. Bd. of Trustees of City Univ. Of N.Y.*, 654 F.2d 856, 859 (2d Cir. 1981) (citation omitted). Significant in this case is the different accrual points for both malicious prosecution and fabrication of evidence claims: "a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor[,]" *Heck v. Humphrey*, 512 U.S. 477, 489 (1994); whereas "a fair trial claim premised on fabrication of evidence accrues when the plaintiff learns or should have learned that the evidence was fabricated and such conduct causes the claimant some injury [,]" *Mitchell v. Home*, 377 F. Supp. 2d 361, 373 (S.D.N.Y. 2005) (citing *Veal v. Geraci*, 23 F.3d 722,724-25 (2d Cir. 1994)).

Plaintiff asserts a malicious prosecution and a fabrication of evidence claim against each of the Defendants. *See* Dkt. No. 1 at ¶¶ 1209-1220.

Plaintiff was acquitted of all charges brought against him on December 21, 2012. *See id.* at ¶ 1200. Plaintiff's malicious prosecution claim accrued upon this favorable disposition of his criminal case. *See Heck*, 512 U.S. at 489. Accordingly, Plaintiff had three years from this point, until December 21, 2015, to assert a malicious prosecution claim. Thus, this cause of action was timely commenced on December 18, 2015, and, to the extent that any of the Defendants' motions argue otherwise, they are denied on this ground.

Plaintiff's opposition appears to argue that, since the alleged malicious prosecution was based upon the use of fabricated evidence, then both of the claims accrued upon Plaintiff's acquittal from the criminal charges. *See* Dkt. No. 60 at 42-59. However, none of the cases cited in Plaintiff's opposition, nor any precedent discovered by the Court, contradicts the clearly established principle that fabrication of evidence claims accrue when the plaintiff learns, or should have learned, that the evidence was fabricated. *See, e.g., Keller v. Sobolewski*, No. 10-CV-5198, 2012 WL 4863228, *4 (E.D.N.Y. Oct. 12, 2012) (quoting *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 127 (2d Cir. 1997)) ("A § 1983 claim for deprivation of the right to a fair trial arises '[w]hen a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors'"); *Bailey v. City of New York*, 79 F. Supp. 3d 424, 444 (E.D.N.Y. 2015) (quotation omitted) ("A claim premised on fabrication of evidence 'accrues when the plaintiff learns or should have learned that the evidence was fabricated and such conduct causes the claimant

some injury"). Moreover, the "reference to 'knowledge of the injury' does not suggest that the statute [of limitations] does not begin to run until the claimant has received judicial verification that the defendants' acts were wrongful." *Mitchell*, 377 F. Supp. 2d at 373 (quoting *Veal*, 23 F.3d at 724). Thus, even when a plaintiff's malicious prosecution claims are premised upon a finding that evidence was fabricated, these are two distinct claims that each accrue separately. *Cf.*, *Morse v. Spitzer*, No. 07-CV-4793, 2012 WL 3202963, *6 (E.D.N.Y. 2012) (emphasis added) ("In such cases, the question of whether the defendant fabricated evidence becomes synonymous with the question of whether genuine probable cause existed, and accordingly a plaintiff's malicious prosecution and fair trial claims would rise or fall together. Even in such cases, however, *these remain distinct constitutional claims*").

Plaintiff also argues that his fabrication of evidence claims are premised upon his Sixth Amendment right to a fair trial, and not solely under the due processes clauses of the Fifth and Fourteenth Amendments. Plaintiff contends that, while the due process claim for fabrication of evidence may accrue when that evidence is first produced, the Sixth Amendment claim accrues upon the termination of his criminal proceeding. *See* Dkt. No. 60 at 48-51 (citing *Bailey v. City of New York*, 79 F. Supp. 3d 424, 455 (E.D.N.Y. 2015); *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999)). Plaintiff bases this argument on the Supreme Court's holding in *Heck*, which delayed the accrual of a prison inmate's § 1983 claim until after his outstanding conviction was overturned, because his § 1983 claim

would have otherwise established the invalidity of his conviction. 512 U.S. at 484. In *Covington*, the Second Circuit extended the holding in *Heck* to "claims that, if successful, would necessarily imply the invalidity of a potential conviction on a pending criminal proceeding." *Covington*, 171 F.3d at 124. The Second Circuit adopted the position that "there is no difference between a conviction which is *outstanding* at the time the civil rights action is instituted and a *potential* conviction on a pending charge that may be entered at some point thereafter." *Id.* (quoting *Smith v. Holtz*, 87 F.3d 108, 113 (3d Cir. 1996)). Thereafter, the Supreme Court admonished the expansion of the *Heck* accrual rule to cases such as this in which a final conviction had not been obtained, holding that such expansion was not warranted:

> What petitioner seeks, in other words, is the adoption of a principle that goes well beyond *Heck*: that an action which would impugn an anticipated future conviction cannot be brought until that conviction occurs and is set aside. The impracticality of such a rule should be obvious. In an action for false arrest it would require the plaintiff (and if he brings suit promptly, the court) to speculate about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict, *see Heck*, 512 U.S., at 487, n.7, 114 S. Ct. 2364—all this at a time when it can hardly be known what evidence the prosecution has in its possession. And what if the plaintiff (or the court) guesses wrong,

> and the anticipated future conviction never occurs, because of acquittal or dismissal? Does that event (instead of the *Heck*-required setting aside of the extant conviction) trigger accrual of the cause of action? Or what if prosecution never occurs—what will the trigger be then?
>
> We are not disposed to embrace this bizarre extension of *Heck*. If a plaintiff files a false-arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended. *See id.*, at 487–488, n.8, 114 S. Ct. 2364 (noting that "abstention may be an appropriate response to the parallel state-court proceedings"); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730, 116 S. Ct. 1712, 135 L.Ed. 2d 1 (1996). If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit. *Edwards v. Balisok*, 520 U.S. 641, 649, 117 S. Ct. 1584, 137 L.Ed. 2d 906 (1997); *Heck*, 512 U.S. at 487, 114 S. Ct. 2364.

Wallace v. Kato, 549 U.S. 384, 393-94 (2007). Moreover, alleging a conspiracy to submit fabricated evidence, rather than asserting the claims against the individual defendants, does not change the

accrual date of such claims because with "claims alleging civil conspiracies, including conspiracies to violate an individual's civil rights, 'the cause of action accrues and the statute of limitations begins to run from the time of commission of the overt act alleged to have caused damages.'" *Harrison v. New York*, 95 F. Supp. 3d 293, 327 (E.D.N.Y. 2015) (citations omitted). Accordingly, Plaintiff's fair trial claim based upon the fabrication of evidence accrued when he knew or should have known that such evidence was being used against him and not upon his acquittal in his criminal case.

The Court notes that, while only the Brown Defendants, Defendant McNally, and the County raise the defense of statute of limitations in their respective motions to dismiss, the Court will consider the timeliness of the claims brought against the remaining Defendants as well. *See Clement v. United Homes, LLC*, 914 F. Supp. 2d 362, 375 (E.D.N.Y. 2012) (citing *Leonhard v. United States*, 633 F.2d 599, 609 n.11 (2d Cir. 1980)) (quotation omitted) ("Where one defendant has successfully raised a statute of limitations defense with respect to a particular claim, a court may also dismiss the claim *sua sponte* as to similarly situated defendants"). Significantly, Plaintiff does not contend that any of the Defendants fabricated evidence within the three-year statute of limitations, rather he relies solely on the argument that this claim did not accrue until his acquittal. As Plaintiff commenced the instant action on December 18, 2015, a fabrication of evidence claim is timely if Plaintiff knew or should have known that the evidence was fabricated on or after December 18, 2012. Plaintiff's

complaint clearly alleges that all of the fabricated evidence was either presented at grand jury proceedings or during his two trials, all of which occurred prior to December 18, 2012. Accordingly, Count I of Plaintiff's complaint alleging the fabrication of evidence is barred by the statute of limitations and, thus, is dismissed as against all Defendants. The Court will not address the merits of the individual Defendants' arguments that Plaintiff failed to state a claim for his fabrication of evidence cause of action.

4. Legal Standard

1. Malicious Prosecution

"The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person – i.e., the right to be free of unreasonable or unwanted restraints on personal liberty." *Singer v. Fulton Cnty. Sher*iff, 63 F.3d 110, 116 (2d Cir. 1995). To assert a Fourth Amendment claim for malicious prosecution under Section 1983, a plaintiff must show a deprivation of his or her liberty consistent with the concept of "seizure," so as to ensure that the harm suffered is of "constitutional proportions." *Id.* The elements of malicious prosecution under Section 1983 effectively mirror the elements of the same claim under New York law. *See Hygh v. Jacobs*, 961 F.2d 359, 366 (2d Cir. 1992) (citations omitted). Accordingly, to state a cause of action for malicious prosecution in New York, the plaintiff must prove "'(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as

a motivation for defendant's actions.'" *Jocks v. Tavernier*, 316 F.3d 128, 136 (2d Cir. 2003) (quotation omitted). To sustain the malicious prosecution claim under Section 1983, "the state law elements must be met, and there must also be a showing of a 'sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights.'" *Rutigliano v. City of New York*, 326 Fed. Appx. 5, 8-9 (2d. Cir. 2009) (quotation omitted).

Plaintiff's complaint clearly pleads the first two elements of a malicious prosecution claim because he was indicted and charged with 74 felony counts, arrested on January 28, 2011, and acquitted of all charges on December 21, 2012. *See* Dkt. No. 1 at ¶¶ 1199-1200; *see also Phillips v. DeAngelis*, 571 F. Supp. 2d 347, 353 (N.D.N.Y. 2008) (citing *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)) ("The requirement that a plaintiff show an initiation or continuation of a criminal proceeding by the defendant may be satisfied by a showing that the defendants filed formal charges and caused the plaintiff to be arraigned").

"'[T]he existence of probable cause is a complete defense to a claim of malicious prosecution in New York.'" *Manganiello v. City of New York*, 612 F.3d 149, 161-62 (2d Cir. 2010) (quoting *Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003)). "Probable cause may . . . exist where the officer has relied on mistaken information, so long as it was reasonable for him to rely on it. However, 'the failure to make a further inquiry when a reasonable person would have done so may be evidence of lack of probable cause.'" *Id.* at 161 (quoting *Colon v. City of New*

York, 60 N.Y.2d 78, 82 (1983)) (internal citation omitted). Moreover, "indictment by a grand jury creates a presumption of probable cause that may *only* be rebutted by evidence that the indictment was procured by 'fraud, perjury, the suppression of evidence or other [official] conduct undertaken in bad faith.'" *Savino*, 331 F.3d at 72 (quoting *Colon*, 60 N.Y.2d at 83). Lastly, the lack of probable cause alone "generally raises an inference of malice." *Ricciuti*, 124 F.3d at 131.

Here, Plaintiff was indicted by a grand jury on January 28, 2011. Dkt. No. 1 at ¶ 809. Plaintiff's indictment was based, in part, upon affidavits from voters who claimed that their ABs had been falsified, which were prepared and notarized by Defendant Smith. *Id.* at ¶¶ 813, 815. At trial, two of the voters whose affidavits were presented at the grand jury proceeding testified that the signature on their purported affidavits were not genuine. *Id.* at ¶ 816; *see also* Dkt. No. 1-1 at 26-30. Plaintiff's indictment was also partially based upon the testimony of Defendant Ogden, who told the grand jury that he reviewed the handwriting on the forged AABs and concluded that they were all falsified by the same person. Dkt. No. 1 at ¶ 758. Thereafter, Defendant Ogden "admitted at trial that his purported law enforcement expert testimony before the Grand Jury was not correct and a mistake." *Id.* at ¶ 768. Defendant O'Malley likewise testified before the grand jury, initially stating that he wrote excuses on several of the AABs, which he testified probably came from the AB candidate who got the information from a democratic committee operative. *Id.* at ¶ 772. Thereafter, Defendant O'Malley returned to the

grand jury to testify that "on September 14, 2009, [Plaintiff] called him into his office and told him to make-up Excuses and write them on those eight (8) AAB, so he did." *Id.* at ¶ 783. Plaintiff contends Defendant Smith called Defendant O'Malley at his house and encouraged him to change his testimony in this manner. *Id.* at ¶ 784. Based upon these allegations of forgery, untruthful testimony, and suppression of evidence, Plaintiff has sufficiently rebutted the presumption that a grand jury indictment creates probable cause for his indictment. *See Boyd v. City of New York*, 336 F.3d 72, 76 (2d Cir. 2003) (quoting *Colon*, 60 N.Y.2d at 82-83) ("The presumption is rebuttable, and may be overcome by evidence establishing that the police witnesses 'have not made a complete and full statement of facts . . . that they have misrepresented or falsified evidence . . . or otherwise acted in bad faith.'").

On the element requiring the prosecution to be motivated by actual malice, the alleged lack of probable cause supporting the grand jury decision, coupled with the alleged purpose of Plaintiff's indictment to be a "scapegoat prosecution" to shield other political candidates from public and legal scrutiny, sufficiently pleads that the prosecution was undertaken with actual malice. *See Ricciuti*, 124 F.3d at 131 (citation omitted) ("[L]ack of probable cause generally raises an inference of malice . . . .").

To state a § 1983 malicious prosecution claim, a plaintiff must also allege "a sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights." *Rohman v.*

N.Y.C. Transit Auth., 215 F.3d 208, 215 (2d Cir. 2000) (citation omitted).

> The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person–i.e., the right to be free of unreasonable or unwarranted restrains on personal liberty. A plaintiff asserting a Fourth Amendment malicious prosecution claim under § 1983 must therefore show some deprivation of liberty consistent with the concept of 'seizure.'

Id. (quoting *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995)). Thus, a plaintiff pursuing a malicious prosecution claim "under § 1983 must show that the seizure resulted from the initiation or pendency of judicial proceedings." *Id.*

Here, Plaintiff was required to endure two separate trials and was not acquitted of the charges against him until nearly two years until after he was indicted. *See* Dkt. No. 1 at ¶¶ 1199-1200. These allegations clearly state that Plaintiff suffered a restraint on his liberty that extended beyond the arraignment itself. *See Rohman*, 215 F.3d at 216 (holding that a plaintiff who was required "to return to court on at least five occasions before the charges against him were ultimately dropped[,]" coupled with the fact that a New York criminal defendant released on his own recognizance "must 'render himself at all times amenable to the orders and processes of the court,'" was sufficient to allege post-arraignment liberty restraint). Accordingly, the Court finds that Plaintiff's complaint has sufficiently alleged facts to support a § 1983 malicious prosecution claim. However, the Court will discuss below whether each

Defendant is individually liable for this malicious prosecution and whether any of the defendants have a valid defense to the claim.

2. § 1983 Conspiracy

A plaintiff may maintain a Section 1983 action against a private party defendant who is engaged in a conspiracy with one or more state actors. *See Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002). To survive a motion to dismiss, the complaint must allege "(1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Id.* at 324-25 (citing *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999)). Thus, a plaintiff must first allege sufficient facts to support an underlying constitutional violation in order to state a valid § 1983 conspiracy claim. *See Curley v. Vill. of Suffern*, 268 F.3d 65, 72 (2d Cir. 2001). Moreover, "[w]hile 'conclusory allegations' of a § 1983 conspiracy are insufficient, we have recognized that such 'conspiracies are by their very nature secretive operations,' and may have to be proven by circumstantial, rather than direct, evidence." *Pangburn*, 200 F.3d at 72 (quoting *Dwares v. City of New York*, 985 F.2d 94, 99-100 (2d Cir. 1993); *Rounseville v. Zahl*, 13 F.3d 625, 632 (2d Cir. 1994)). In the instant case, the alleged unconstitutional injury implicated by the conspiracy is based on a claim of malicious prosecution. As discussed above, Plaintiff has adequately pled facts to support a malicious prosecution claim. In the following sections, the Court will discuss whether Plaintiff's

complaint sufficiently alleges actions taken by each of the Defendants to support a conspiracy claim.

5. Absolute Immunity

Trial or grand jury witness testimony, even if perjured, cannot serve as the basis for a § 1983 claim. *See Coggins v. Cnty. of Nassau*, 988 F. Supp. 2d 231, 244 (E.D.N.Y. 2013) (citing *Briscoe v. LaHue*, 460 U.S. 325, 335-36 (1983)); *see also Rehberg v. Paulk*, 132 S. Ct. 1497, 1506-07 (2012) (holding that asserting a § 1983 claim as a conspiracy, rather than as an individual action, does not remove the absolute immunity protection). Moreover, preparatory communications between a witness and a prosecutor regarding the contents of any future testimony is entitled to absolute immunity. *See Rehberg*, 132 S. Ct. at 1506-07 ("In the vast majority of cases involving a claim against a grand jury witness, the witness and the prosecutor conducting the investigation engage in preparatory activity, such as a preliminary discussion in which the witness relates the substance of his intended testimony").

a. Coggins Exception

Simply because a defendant is a witness in a grand jury or trial proceeding, however, does not grant that individual absolute immunity for all actions arising out of the substance testified about. *See Coggins v. Buonora*, 776 F.3d 108, 112-13 (2d Cir. 2015). Rather, the absolute immunity extends only to that information that was the substance of the witness' testimony. In *Coggins*, the Second Circuit held that a plaintiff may state a valid malicious prosecution claim against a grand jury witness, even with absolute immunity for the testimony given in such

proceeding, if the plaintiff alleges actions taken in excess of that witness' testimony that would amount to an independent § 1983 claim. *Id.* at 113.

> When a police officer claims absolute immunity for his grand jury testimony under *Rehberg*, the court should determine whether the plaintiff can make out the elements of his § 1983 claim without resorting to the grand jury testimony. If the claim exists independently of the grand jury testimony, it is not "based on" that testimony, as that term is used in *Rehberg*. *Id.* at 1506. Conversely, if the claim requires the grand jury testimony, the defendant enjoys absolute immunity under *Rehberg*.

Id. A defendant likewise does not receive absolute immunity for information related to their testimony that he or she discloses through another source. *Id.* ("The fact that [a witness'] grand jury testimony paralleled information he gave in other contexts does not mean that [the plaintiff's] malicious prosecution claim was 'based on' [the witness'] grand jury testimony. Rather it was based on [the witness'] conduct that laid the groundwork for [the plaintiff's] indictment").

The Second Circuit's holding in *Coggins* requires a court to determine whether a statement or action made in addition to a witness' testimony is preparatory activity in anticipation for that testimony, which would receive aboslute immunity. *See Coggins*, 776 F.3d at 113 n.7. In the post-*Coggins* line of cases in this circuit, there are three emerging factors that are relevant to whether a given activity is considered preparatory. First is the

timing of the action as compared to the plaintiff's indictment and the defendant's testimony, *see O'Neal v. City of New York*, 14-CV-7649, 2016 WL 4035522, *6 (S.D.N.Y. July 22, 2016), second is the form of the action, whether it is a written documentation or an oral statement to the prosecutor or investigator, *see id.* at *7, and the third is whether the defendant's statement was an isolated remark that is "merely prefatory to a defendant['s] . . . own testimony" as compared to one designed to elicit additional false testimony from other witnesses, *see Fappiano v. City of New York*, No. 01 Civ. 2476, 2015 WL 94190, *20 (E.D.N.Y. Jan. 7 2015).

Fabricated documentary evidence, such as a police report or investigative affidavit, given to a district attorney that lays the groundwork for a plaintiff's indictment is clearly not preparatory activity and does not receive absolute immunity. *See Rucks v. City of New York*, 96 F. Supp. 3d 138, 150 (S.D.N.Y.) (holding that an investigating officer's actions of making false statements to each other, in written police reports, and to the ADA were not entitled to absolute immunity). In *Coggins*, the Second Circuit concluded that an officer who falsified official documents related to the plaintiff's arrest, failed to complete an incident report, and conspired to create "an altered version of what transpired . . . and made a conscious decision to omit certain information and include false information in the Police Report and accompanying arrest paperwork" was not entitled to absolute immunity. 776 F.3d at 110-11. The officer's actions and falsified reports were the main basis for the plaintiff's grand jury indictment. *Id.* By contrast, in *O'Neal*, the defendant witness made oral

false statements to a prosecutor two weeks before he testified at trial, and nearly ten months after the plaintiff was indicted. 2016 WL 4035522, at *5. The Southern District concluded that these statements were merely preparatory activity since they did not play an active role in the plaintiff's indictment, they consisted solely of oral statements to the prosecutor and did not include any fabricated documentary evidence, and the statement to the prosecutor simply mirrored the defendant's testimony at trial. *Id.* at *7-8.

In *Fappiano v. City of New York*, the Eastern District drew the distinction between an officer merely presenting false testimony at trial, and an officer actively engaging in pre-trial acts to solicit false testimony from other witnesses in order to "fill the gaps" in his story to aid in the plaintiff's conviction. 2015 WL 94190, at *20 (citing *Mitchell v. City of Boston*, 130 F. Supp. 2d 201, 212 (D. Mass. 2001)). In *Mitchell*, "the court found that the officer whose total involvement was allegedly testifying falsely was immune under *Briscoe*, while the other officer, who was 'the mastermind of the plot to fabricate evidence,' was not immune because he did more than falsely testify–he fabricated a case against the defendant-turned-plaintiff by taking 'it upon himself to fill the gaps in his story by soliciting false testimony from [his partner].'" *Fappiano*, 2015 WL 94190, at *20 (quoting *Mitchell*, 130 F. Supp. 2d at 213). The *Coggins* decision requires the district court to determine whether a plaintiff's complaint contains sufficient allegations against the witness-defendants, separate from his trial or grand jury

testimony, that amount to an independent § 1983 claim. 776 F.3d at 113.

b. Complaining Witness

An individual who plays a role in initiating a criminal defendant's prosecution is known as a complaining witness. *See White v. Frank*, 855 F.2d 956, 959 (2d Cir. 1988); *see also Rehberg v. Paulk*, 132 S. Ct. 1497, 1507 (2012) (noting that a complaining witness need not testify before a grand jury or in trial). Such a complaining witness, even if he or she later testifies, does not receive absolute immunity for the actions taken to initiate the prosecution. *White*, 855 F.2d at 959 (citing *Malley v. Briggs*, 475 U.S. 335, 340 (1986)). However, merely presenting key testimony at a grand jury proceeding that leads to an indictment does not transform that witness into a complaining witness. *See Rehberg*, 132 S. Ct. at 1507-08. Rather, a complaining witness must take such control over the initiation of the prosecution as to effectively overtake the decision of whether to press charges away from the prosecutor. *Id.*

C. Defendant McInerney[2]

1. Malicious Prosecution

a. Individual Liability

Initially, Plaintiff has failed to allege that Defendant McInerney was directly responsible for his malicious prosecution. Plaintiff's opposition

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[2] The Court will not consider the self-serving affidavits that Defendant McInerney or Plaintiff submitted with this motion. *See Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000).

argues that Defendant McInerney was a complaining witness and, as such, is subject to an individual malicious prosecution claim. However, Plaintiff has not alleged that Defendant McInerney became involved in the investigation or gave any statements about the circumstances underlying his prosecution until after Plaintiff had already been indicted. The only pre-indictment actions done by Defendant McInerney was his grand jury testimony. As such, to the extent that Plaintiff's complaint contains a direct cause of action for malicious prosecution against Defendant McInerney, any such claim is dismissed.

b. Conspiracy

Defendant McInerney argues that his motion to dismiss should be granted for the following three reasons: (1) that he enjoys absolute immunity for his trial and grand jury testimony, (2) that the routine communications between himself and the prosecutor, Defendant Smith, cannot serve as the basis for a § 1983 conspiracy claim, and (3) Defendant McInerney's cooperation in investigations and during plea negotiations cannot amount to a malicious prosecution conspiracy. *See* Dkt. No. 12-2 at 7-12.

Plaintiff alleges that Defendant McInerney conspired with Defendant Smith to produce false testimony at trial and before the grand jury. The acts alleged in furtherance of this conspiracy are that (1) Defendant McInerney testified falsely at the direction of Defendant Smith and withheld pertinent information from his testimony that would have exonerated Plaintiff, (2) Defendant McInerney prepared a sworn, written statement on September 16, 2011 that falsely incriminated Plaintiff, (3) Defendant McInerney engaged in several discussions

with Defendant McNally and Defendant Smith outside of police presence, and (4) Defendant Smith offered Defendant McInerney immunity for his testimony and, after his indictment was imminent, offered a generous plea deal that avoided significant incarceration.

Defendant McInerney's grand jury and trial testimony receive absolute immunity and cannot serve as the basis for a § 1983 claim, even if that testimony was fabricated or perjurious. *See generally Rehberg v. Paulk*, 132 S. Ct. 1497 (2012). Further, allegations of a witness' communication with the prosecutor to prepare for such testimony are likewise insufficient to state a conspiracy claim. *See Scotto v. Almenas*, 143 F.3d 105, 115 (2d Cir. 1998) (quoting *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 256 (2d Cir. 1984)) ("[T]here [is] 'nothing suspicious or improper in such meetings [between a witness and a prosecutor], which are routine and necessary in the preparation of evidence,' and that the 'mere allegation of their occurrence is [not] sufficient to create a material issue of fact as to whether something improper took place during them. . . ."); *see also Rehberg*, 132 S. Ct. at 1506-07.

Defendant McInerney's act of issuing a written statement, however, does not automatically receive absolute immunity. *See Coggins*, 776 F.3d at 113. His written statement says, in part, that "on September 15, 2009 LoPorto called several times and asked if the AB 'were done yet' and after he forged them he gave them to LoPorto at City Hall in a manila envelope." Dkt. No. 1 at ¶ 156. Further, Defendant McInerney state that he was "certain that those AB never left the [Board of Elections], and that

they were forged by [Plaintiff] while in his office." *Id.* at ¶ 1018. This written statement was prepared at Defendant Smith's direction and falsely incriminated Plaintiff. *Id.* at ¶¶ 1008-13. The Court concludes that, based upon the allegations in Plaintiff's complaint, Defendant McInerney's written statement was not merely preparatory activity for his trial testimony and, thus, is not entitled to absolute immunity.

In *Coggins* and *Rucks*, as opposed to here, the allegedly false written statement was issued prior to the plaintiff's indictment by the grand jury. *See Coggins*, 776 F.3d at 114; *Rucks*, 96 F. Supp. 3d at 148. By contrast, Defendant McInerney did not issue his written statement until after Plaintiff was indicted by the grand jury on January 28, 2011. *See* Dkt. No. 1 at ¶ 809. The Court finds that the holding in *Coggins* is not limited to written statements made prior to a plaintiff's indictment, as a defendant may be liable for a malicious prosecution claim for the continuation of a proceeding after it is clear that no probable cause exists and not just for the initiation of such action in the absence of probable cause. *See, e.g., Weiner v. McKeefery*, 90 F. Supp. 3d 17, 35 (E.D.N.Y. 2015) (quotation omitted) ("[C]ontinued prosecution after facts sufficient to exonerate the accused have been provided may give rise to an action for malicious prosecution under New York law"). Here, Defendant McInerney issued his written statement prior to Plaintiff's first trial in February of 2012 and well before Plaintiff's second trial. Moreover, Plaintiff clearly alleged that Defendant McInerney's written statement served as a basis upon which the other witnesses fabricated

their testimony to ensure that it was consistent with the prosecution's otherwise unsupported theory against Plaintiff. Dkt. No. 1 at ¶ 1009. Accordingly, the fact that Defendant McInerney's written statement was made after Plaintiff had already been indicted does not preclude the finding that the written statement nonetheless contributed to Plaintiff's continued malicious prosecution. Further, that Defendant McInerney issued his statement as a sworn, written document, rather than simply through oral communications with Defendant Smith, warrants a finding that this statement was more than merely a preparatory action for his testimony and instead was created to influence the testimony of the other witnesses. *See Mitchell*, 130 F. Supp. 2d at 212 (holding that a written statement that forms the basis for future false testimony is not protected by absolute immunity). Plaintiff has clearly alleged that this written statement was made in connection with and at the direction of Defendant Smith, thereby alleging an agreement between Defendant McInerney, a private actor, and Defendant Smith, a state actor. Dkt. No. 1 at ¶ 1008. The Court finds that, based upon Plaintiff's allegations, Defendant McInerney's written statement was not created solely for the preparation of his trial testimony. Thus, the written statement, which is not protected by absolute immunity, could have been a foundation upon which other witnesses may have shaped their allegedly false testimony that was presented at trial, thereby alleging an independent ground apart from Defendant McInerney's trial testimony upon which to base the malicious prosecution claim.

Plaintiff's additional allegations, although circumstantial, support his claim that Defendants Smith, who is a state actor, and McInerney were acting in concert. *See In re Dana Corp.*, 574 F.3d 129, 153 (2d Cir. 2009) (quotation omitted) ("[I]t is well established that '[b]oth the existence of a conspiracy and a given defendant's participation in it with the requisite knowledge and . . . intent may be established through circumstantial evidence'"). Defendant Smith's initial promise of non-prosecution, coupled with the allegedly lenient treatment of Defendant McInerney in affording him a favorable plea deal for the same conduct that Plaintiff was accused of, supports Plaintiff's contention that the Defendants were attempting to focus the prosecution on him so that the other Defendants involved would not be convicted of the forgeries in which they were directly implicated. Defendant Smith offered Defendant McInerney a plea deal for one felony charge and a 90 day work order in satisfaction of all charges that could have been brought against him for the three years of easily provable forgeries involved in the 2007, 2008, and 2009 elections, each charge of which would have carried consecutive sentences of two to seven years. Dkt. No. 1 at ¶ 971; Dkt. No. 12-2 at 3. During the initial investigation into Plaintiff, Defendant Smith repeatedly declared that he did not have enough evidence to indict McInerney for the forgery scheme, *see* Dkt. No. 1 at ¶ 573, despite ultimately changing his position and indicting Defendant McInerney only after independent New York State Police and FBI investigations intervened, *id.* at ¶¶ 929, 930-31, 942. Further, as soon as it became clear that Defendant McInerney was going to face charges for forgeries in

the 2007 and 2008 elections, Defendant Smith immediately moved to expand his jurisdiction to prosecute those cases, *id.* at ¶¶ 993, 1001, despite previous repeated assertions that he did not have the authority to prosecute the earlier elections' forgeries when evidence clearly implicated Defendant McInerney, *see id.* at ¶¶ 364-380, 400, 487, 492-500. Moreover, Plaintiff's allegations of several off-the-record meetings between Defendant Smith and McInerney hint at the possibility of the two acting in concert.[3] *See id.* at ¶¶ 1003-04. Accordingly, Plaintiff has stated a valid claim that Defendant McInerney conspired to maliciously prosecute Plaintiff in violation of § 1983. Defendant McInerney's motion is denied on this ground.

3. Municipal Liability

Defendant McInerney argues that Plaintiff has failed to allege any facts sufficient to hold him personally liable for the allegations contained in Count III. *See* Dkt. No. 12-2 at 19. As Count III is directed solely at the County of Rensselaer and does not implicate any individual Defendant, Defendant McInerney's motion on this ground is denied as moot. To the extent that any of the other individual Defendants raise an argument to dismiss Count III, those arguments are likewise denied as moot since Count III does not allege any action against the individual Defendants.

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[3] The Court notes that, if discovery were to establish that these meetings constituted "preparatory activity" for Defendant McInerney's trial testimony, then Defendant McInerney would be entitled to absolute immunity for that conduct. *See Coggins*, 776 F.3d at 113 & n.7 (citing *Rehberg*, 132 S. Ct. at 1506-07).

C. John and Daniel Brown[4]

Plaintiff's opposition to the Brown Defendants' motion states that "the allegations of conspiracy [in the complaint] are supported by numerous particularized facts which, taken as true, 'suggest than an agreement was made' whether tacit or expressed . . . ." Dkt. No. 60 at 60-61. However, Plaintiff does not describe what particular assertions he is referring to. A liberal reading of Plaintiff's complaint finds the following specific accusations against the Brown Defendants. Prior to October 1, 2009, Defendant Smith allegedly told and John Brown that he would not be prosecuted for the AB forgery. *Id.* at ¶ 266. On December 6, 2011, Defendant John Brown entered into a cooperation agreement, pursuant to which he was required to provide complete and truthful cooperation in return for a guilty plea to one felony count with up to six months incarceration and five years probation. *Id.* at ¶ 1056. Thereafter on December 6, 2011 he gave a sworn, written deposition wherein he fabricated incidents that occurred in Plaintiff's office and implicated Plaintiff in the forgery scheme. *Id.* at ¶ 1057-58. Specifically, John Brown stated that

> (a) he saw McGrath g[i]ve [Plaintiff] an AAB and what seemed to be a false Excuse for an older voter and [Plaintiff] then wrote information on that AAB; (b) he was in [Plaintiff's] office for about forty (40) minutes

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[4] The Court will not consider the self-serving affidavits or additional evidence submitted with the Brown Defendants' motion to dismiss. *See Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000).

> during which he saw the AAB he brought to the [Board of Elections] sitting on [Plaintiff's] desk; (c) he saw [Plaintiff] writing on documents but could not say for sure that they were those AAB; and, (d) he saw O'Malley come in and out of the office but did not recall him sitting at a desk or writing on any AAB.

Id. at ¶ 1059. Plaintiff alleges that Defendant Smith met with John Brown before he issued this statement to ensure that it was consistent with the other Defendants' sworn testimony. *Id.* at ¶ 1061. Further, Plaintiff contends that John Brown tampered with another witness, DeFiglio, by offering him a job in Vermont in an attempt to get DeFiglio not to talk with the police. *See id.* at ¶¶ 504, 509.

This written statement is similar to Defendant McInerney's, in that it was issued after Plaintiff was indicted, but before any testimony at either of his trial. Plaintiff contends that this written statement served the basis for other Defendants' allegedly false testimony in an attempt to continue the malicious prosecution of Plaintiff. *Id.* at ¶ 1061. While this written statement does not receive absolute immunity and is arguably an overt act that contributed to Plaintiff's malicious prosecution, Plaintiff has failed to state sufficient allegations that John Brown and Defendant Smith had an agreement to engage in such unconstitutional actions. Plaintiff's complaint consists of mainly conclusory allegations that John Brown conspired with Defendant Smith to scapegoate prosecute Plaintiff for the AB forgeries. In contrast to the allegations against Defendant McInerney that state specific interactions and communications between Defendant

Smith and Defendant McInerney to state a valid conspiracy claim, Plaintiff's allegations against John Brown are mere conclusory statements and any circumstantial evidence linking John Brown to Defendant Smith is fall more tenuous than that against Defendant McInerney. *See Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993), *overruled on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) ("[A plaintiff] should make an effort to provide some 'details of time and place of the alleged effect of the conspiracy'").

The extent of Plaintiff's non-conclusory allegations against John Brown are that, prior to 2011, Defendant Smith told officials from the New York State Police that John Brown could not be prosecuted because the evidence against him was not legally sufficient to corroborate the testimony of DeFiglio. *Id.* at ¶ 573. On December 6, 2011, after his indictment was imminent, John Brown entered into a cooperation agreement and pled guilty to one felony count and was sentenced to six months incarceration and five years probation. *Id.* at ¶ 1056. This sentence was the most that any of the co-conspirators in the forgery scheme received, far less favorable that the 90 day work order given to Defendant McInerney or the 200 hours of community service given to Defendant Renna. *See* Dkt. No. 1 at ¶¶ 971, 1033; Dkt. No. 40-3 at 16; *see also Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002) (holding that the adversarial position of alleged co-conspirators belies bald conclusory allegations of conspiracy). Plaintiff's response to the Brown Defendants' motion argues that "numerous

detailed facts and circumstances" contained in the complaint indicate John Brown's alleged agreement to conspire with Defendant Smith, yet he does not specifically cite to any of these so-called "detailed facts." *See* Dkt. No. 60 at 60. Accordingly, the Court finds that Plaintiff's complaint fails to sufficiently allege, beyond mere conclusory allegations, that John Brown actively or implicitly agreed to conspire with Defendant Smith in an effort to continue the malicious prosecution against Plaintiff. As such, Plaintiff's malicious prosecution conspiracy claims against John Brown are dismissed.

The only allegations implicating Daniel Brown is that he falsely testified before the grand jury. *Id.* at ¶ 1133. In their motion to dismiss, the Brown Defendants argue that Daniel Brown did not testify before the grand jury, and only testified in Plaintiff's first criminal trial. *See* Dkt. No. 40-3 at 9. Irrespective of when Daniel Brown testified, his testimony from either the grand jury or at trial are equally entitled to absolute immunity and cannot serve as the basis for a § 1983 conspiracy claim. *See Rehberg*, 132 S. Ct. at 1506-07. Plaintiff argues that the Brown Defendants do not receive absolute immunity for their testimony because they are "complaining witnesses." *See* Dkt. No. 60 at 63-64. This argument is unavailing given that neither of the Brown Defendants were involved in the investigation until after Plaintiff had been indicted. As such, their actions could not have directed Defendant Smith to start the prosecution against Plaintiff and, also, could not have formed the basis of Plaintiff's indictment. Accordingly, all malicious prosecution and conspiracy claims against Daniel Brown are

dismissed given his absolute immunity for trial and grand jury testimony. The Brown Defendants' motion to dismiss is granted in its entirety and both John and Daniel Brown are terminated from this action.

D. Defendant O'Malley

Plaintiff's complaint repeatedly states, in conclusory fashion, that Defendant O'Malley actively conspired with Defendant Smith and the other Defendants to scapegoat prosecute Plaintiff for the AB forgeries. Fatal to Plaintiff's claims, however, is the absence of any allegation of an overt act taken by Defendant O'Malley, apart from trial and grand jury testimony, that was in furtherance of any such alleged conspiracy. In fact, Plaintiff specifically alleges that "O'Malley's role . . . was to not talk prior to Grand Jury, but give fabricated false testimony as needed at Grand Jury and trial to initiate and continue the scapegoat prosecution." Dkt. No. 1 at ¶ 452. As discussed above, Defendant O'Malley's testimony, even if fabricated or perjurious, receives absolute immunity and cannot serve as the basis for a § 1983 claim. *See Rehberg*, 132 S. Ct. at 1506-07.

Plaintiff's opposition argues that Defendant O'Malley took actions in concert with Defendant Smith, at some unmentioned time and unknown location, to work together to fabricate O'Malley's grand jury testimony to be consistent with the other Defendants'. *See* Dkt. No. 69. Even if Plaintiff alleged in a less conclusory and more detailed fashion the manner in which Defendants Smith and O'Malley worked together to plan his grand jury testimony, such preparatory activity is entitled to absolute immunity. *See Coggins v. Buonora*,

776 F.3d 108, 113 n.7 (2d Cir. 2015). Plaintiff does not allege that Defendant O'Malley took some other action outside of his testimony, such as contributing to a false police report, issuing a false written statement, or actively participating in the investigation, that acted to further the alleged conspiracy. Accordingly, Plaintiff has not stated any allegations separate and distinct from Defendant O'Malley's trial or grand jury testimony that would independently support a § 1983 claim. *See id.* at 113.

Plaintiff also argues that "[n]o decision has extended absolute immunity to prosecutors, police officers or private citizens for the act of manufacturing false evidence outside the judicial process to later present before a grand jury or trial." Dkt. No. 69 at 13. While Plaintiff's opposition does not separate whether he is discussing his fabrication of evidence claims or his malicious prosecution claims, it appears that the majority of his discussion involves the fabrication of evidence claim. As noted above, all such claims are dismissed on statute of limitations grounds. Thus, Defendant O'Malley's motion to dismiss is granted in its entirety and he is terminated from this action.

E. Defendant Robillard

Defendant Robillard argues that the only allegations against him in the complaint are either conclusory statements that he engaged in the conspiracy or concern activities that are protected by absolute immunity. *See* Dkt. No. 56-1. Plaintiff's memorandum in opposition, which is in large part identical to his opposition to Defendant O'Malley's motion, again focuses mainly on his fabrication of evidence claims. *See* Dkt. No. 71.

Plaintiff's complaint patently fails to allege that Defendant Robillard engaged in any actions in furtherance of the alleged conspiracy that are not covered by absolute immunity. Defendant Smith hired Defendant Robillard as the forensic document examiner to perform a comparison of handwriting samples from Plaintiff and LoPorto. Dkt. No. 1 at ¶¶ 880, 884. In his request for a handwriting comparison, Defendant Smith detailed the testimony against Plaintiff in a letter to Defendant Robillard. *See* Dkt. No. 1-1 at 35-37. Also, Defendant Ogden testified that he "talked to Robillard about the theory of prosecution and evidence" before he issued his report. Dkt. No. 1 at ¶ 1137. Defendant Robillard gave his expert testimony that it was Plaintiff's handwriting on nearly all of the falsified AABs. *Id.* at ¶ 897. He made these initial findings without comparing the handwriting of John Brown, Dan Brown, Defendant McGrath, or other suspects. *Id.* at ¶ 1145. Defendant Robillard was paid approximately $100,000 and was instructed by Defendant Smith to not conduct an ink analysis on several of the falsified AABs. *Id.* at ¶¶ 898, 902, 1152. Accordingly, the only alleged act undertaken by Defendant Robillard in this case was testifying in his expert opinion that it was Plaintiff's handwriting on the falsified AABs. Such testimony is clearly covered by absolute immunity and cannot form the basis for a § 1983 claim. *See, e.g., Elmasri v. England*, 222 F. Supp. 2d 212, 222 (E.D.N.Y. 2000) (citing *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)) ("This [absolute witness] immunity extends to all persons, whether governmental, expert, or lay witnesses, integral to the trial process").

To the extent that Plaintiff contends that any meetings between Defendant Smith or Ogden and Defendant Robillard are overt acts in furtherance of the conspiracy, these arguments are likewise unavailing. The alleged discussions and meetings between these Defendants were clearly in preparation for Defendant Robillard's testimony. Plaintiff alleges that Defendants Smith and Ogden informed Defendant Robillard of their theory of the case and instructed him to shape his testimony to meet this theory. *See* Dkt. No. 1 at ¶¶ 362, 890-95, 903. Such preparatory activity, even if preparing to present false testimony, is entitled to absolute immunity. *See Rehberg*, 132 S. Ct. at 1506-07; *Coggins*, 776 F.3d at 112. Further, to the extent that Plaintiff alleges that Defendant Robillard failed to conduct a sufficient examination of the handwriting, all of the allegations state that Defendant Smith instructed Defendant Robillard to not compare additional handwriting samples and to not conduct an ink analysis. *See* Dkt. No. 1 at ¶¶ 898, 902, 1145, 1152; *see also Shmueli v. City of New York*, 424 F.3d 231, 237 (2d Cir. 2005) (citing *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976)) (noting that absolute immunity attaches to a prosecutor's decision to withhold exculpatory information). Accordingly, the Court finds that all of Defendant Robillard's alleged acts in furtherance of Plaintiff's malicious prosecution are protected by absolute immunity. Thus, Defendant Robillard's motion is granted, he is terminated from this action, and Plaintiff's claims against Defendant Robillard are dismissed.

F. Defendant McNally

1. Official Capacity

The Eleventh Amendment provides a state with sovereign immunity from suit. *See Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (citation omitted). "To the extent that a state official is sued for damages in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state." *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993) (citations omitted). Here, Plaintiff concedes that Defendant McNally is entitled to Eleventh Amendment immunity for the suit against him in his official capacity. *See* Dkt. No. 82 at 10. Accordingly, Plaintiff's claims against Defendant McNally in his official capacity are dismissed.

2. Individual Capacity

Defendant McNally argues that his decision to recuse himself as district attorney is entitled to absolute prosecutorial immunity and, even if no such immunity applies, Plaintiff has failed to sufficiently allege that Defendant McNally engaged in the conspiracy with Defendant Smith to continue the malicious prosecution against Plaintiff. *See* Dkt. No. 64-4.

The Second Circuit has not clearly established whether a district attorney's decision to recuse himself is entitled to absolute immunity. Plaintiff argues that the recusal decision is a purely administrative decision, which is not entitled to prosecutorial immunity. *See* Dkt. No. 82 at 11; *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 273

(1993) ("A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity"). Defendant McNally, on the other hand, argues that his decision to recuse himself is akin to the decision of whether or not to initiate a prosecution, which is afforded absolute immunity. *See* Dkt. No. 84 at 8; *see also Schloss v. Bouse*, 876 F.2d 287, 290 (2d Cir. 1989) (holding that absolute prosecutorial immunity extends to the decision to prosecute as well as the decision not to prosecute). The Court finds that a district attorney is entitled to absolute immunity for the act of recusing himself from a prosecution because such act is intimately tied to his functions as an advocate for the people. If a prosecutor could be personally liable for his decision to recuse himself from a case, it would open the possibility of having to decide between refusing to recuse, which could potentially taint the outcome of a case if a perceived conflict is present, and recusing one's self and potentially being subject to personal liability for this action. It would be contrary to the goals of the inherent advocacy in our judicial system to allow such decisions to be influenced by concerns of personal liability. The Second Circuit has extended absolute immunity to other, similar actions because of the same concern that potential personal liability should not influence important prosecutorial decisions. If a prosecutor is entitled to absolute immunity for choosing to prosecute an action, then it is logically extended that they should be entitled to absolute immunity for deciding to forego prosecution, as it would be improper for a prosecutor's decision on whether or

not to prosecute to be based upon concerns of potential personal liability. *Schloss*, 876 F.2d at 290. In a similar vein, a judge's decision to recuse himself is described as a judicial, rather than administrative, act that is entitled to absolute judicial immunity. *See Bobrowsky v. Yonkers Courthouse*, 777 F. Supp. 2d 692, 714 (S.D.N.Y. 2011). Moreover, at least one other circuit has held that a district attorney's decision to recuse himself is entitled to absolute prosecutorial immunity. *See Delta Fuel Co., Inc. v. Maxwell*, 485 Fed. Appx. 685, 686 (5th Cir. 2012) (per curium) (citing *Imbler v. Pachtman*, 424 U.S. 409, 428 (1976)) ("[B]ecause the recusal was done in [the defendant's] role as district attorney, [the defendant] was entitled to absolute prosecutorial immunity"). To the extent that Plaintiff argues that Defendant McNally's recusal was illegal or improper, Justice Pulver of Rensselaer County Supreme Court so ordered Defendant McNally's recusal and appointed Defendant Smith to be acting special district attorney for the case, thereby affirming Defendant McNally's position that his recusal and Defendant Smith's appointment were legal actions sanctioned by the state supreme court. *See* Dkt. No. 99-55. Accordingly, Defendant McNally's decision to recuse himself from prosecuting the AB forgery case is entitled to absolute immunity and cannot serve as the basis for a § 1983 claim.

The actions that Defendant McNally took after he recused himself, however, are not entitled to absolute immunity. *See Kulwicki v. Dawson*, 969 F.2d 1454, 1467 (3d Cir. 1992) (holding that actions taken by a prosecutor after he had recused himself from the case were not entitled to absolute prosecutorial

immunity). Plaintiff alleges that "McNally also violated the rules of ethics and N.Y.S. Judiciary Law § 493 by giving legal advice to McInerney, McDonough and Martiniano, taking physical custody of AB documents and DNA reports related to the case and discussing the matter with Trey Smith subsequent to his unlawful self-disqualification." Dkt. No. 1 at ¶ 257. Plaintiff alleges that Defendant McNally's cell-phone records "will show he communicated with McInerney, Trey Smith and Chair Wade before and/or during the scapegoat prosecution." *Id.* at ¶ 220. Further, Defendant Smith admitted "that he and McNally talked about the AB forgery after McNally disqualified himself from the matter." *Id.* at ¶ 300. Defendant McNally allegedly advised Robert Martiniano to not inform the police or Defendant Smith that he had relevant knowledge about the AB forgery. *Id.* at ¶¶ 651-58.

The Court finds that Defendant McNally's act of dissuading Robert Martiniano from providing police with relevant testimony that would have allegedly exonerated Plaintiff was an overt act that allowed the continued malicious prosecution of Plaintiff. However, Plaintiff has not sufficiently alleged that Defendant McNally engaged in this act in furtherance of an agreement with Defendant Smith to scapegoat prosecute Plaintiff. While Plaintiff alleges that Defendant McNally knew that Martiniano had "personal knowledge of facts relevant to the AB forgery," *id.* at ¶ 651, Plaintiff does not contend that Defendant McNally knew that the information would have been exculpatory for Plaintiff. In fact, Plaintiff specifically states that Defendant McNally "gave that advice without having

any discussion with Martiniano about the facts of which he had knowledge." *Id.* at 656. Plaintiff contends that Defendants McInerney and John Brown admitted to Martiniano that they were forging ABs, however Plaintiff fails to allege that Defendant Smith or McNally knew the substance Martiniano's knowledge of the AB forgeries at the time Defendant McNally advised him not to talk to police. Thus, the overt act of discouraging Martiniano from talking with the police could not have been done for the purpose of furthering Plaintiff's malicious prosecution because Defendant McNally had no reason to know what Martiniano's cooperation with police might have uncovered.

The remaining allegations against Defendant McNally are likewise insufficient to support the assertion that he acted in agreement with Defendant Smith to further Plaintiff's malicious prosecution. While Defendants Smith and McNally undoubtedly talked about the AB forgery case and Defendant McNally had access to relevant evidence in the case, Plaintiff has only stated conclusory allegations that the meetings or conversations between the two were for the purpose of maliciously prosecuting Plaintiff. Mere communications between an individual and a prosecutor, without more concrete allegations of wrongdoing, are insufficient to state a malicious prosecution conspiracy claim. Defendant McNally's continued contact with Defendant Smith after recusing himself from the prosecution, while not advised given the potential appearance of impropriety, does not necessarily indicate a conspiratorial agreement. Plaintiff's repeated conclusory allegations that these meetings were for

the purpose of continuing the prosecution against Plaintiff do not give legitimacy to otherwise insufficient allegations. *See Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 325 (2d Cir. 2002) (quotation omitted) ("[C]omplaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct"). Accordingly, the Court finds that Plaintiff has failed to sufficiently allege that Defendant McNally agreed with Defendant Smith, either implicitly or explicitly, to maliciously prosecute Plaintiff. Defendant McNally's motion is granted in its entirety and he is terminated from this action.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions, and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant McInerney's motion to dismiss (Dkt. No. 12) is **GRANTED** in part and **DENIED** in part as stated herein;[5] and the Court further

ORDERS that Defendants John and Daniel Brown's motion to dismiss (Dkt. No. 40) is **GRANTED** in its entirety; and the Court further

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[5] Plaintiff's § 1983 conspiracy to commit malicious prosecution claim against Defendant McInerney survives the instant motion. Plaintiff's fabrication of evidence and *Monell* liability claims against Defendant McInerney are dismissed.

ORDERS that Defendant O'Malley's motion to dismiss (Dkt. No. 50) is **GRANTED** in its entirety; and the Court further

ORDERS that Defendant Robillard's motion to dismiss (Dkt. No. 56) is **GRANTED** in its entirety; and the Court further

ORDERS that Defendant McNally's motion to dismiss (Dkt. No. 64) is **GRANTED** in its entirety; and the Court further

ORDERS that Plaintiff's fabrication of evidence claims are **DISMISSED** as against all Defendants on statute of limitations grounds; and the Court further

ORDERS that Defendants John and Daniel Brown, O'Malley, Robillard, and McNally are terminated from this action; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: September 30, 2016.
Albany, New York

Mae A. D'Agostino
Mae A. D'Agostino
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 1:15-cv-01505
(MAD/DJS)

EDWARD G. MCDONOUGH,

Plaintiff,

v.

YOUEL C. SMITH, III, individually and as Special District Attorney for the County of Rensselaer, New York, a/k/a TREY SMITH, KEVIN B. MCGRATH; WILLIAM A. MCINERNEY; JOHN J. OGDEN; ANTHONY J. RENNA; THE COUNTY OF RENSSELAER, NEW YORK,

Defendants.

APPEARANCES:

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OF COUNSEL:

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Mae A. D'Agostini, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff Edward G. McDonough ("Plaintiff") commenced this action by filing a 174 page, 1220 paragraph complaint on December 18, 2015, asserting three causes of action pursuant to 42 U.S.C. § 1983 ("Section 1983") against eleven named Defendants. *See* Dkt. No. 1. In a Memorandum-Decision and Order dated September 30, 2016 (the "Prior Decision"), this Court dismissed Plaintiff's claims against Defendants O'Malley, Robillard, McNally, and John and Daniel Brown. *See* Dkt. No. 114. The Court dismissed all of Plaintiff's claims against Defendant McInerney except for Plaintiff's

Section 1983 conspiracy to commit malicious prosecution claim. *See id.* at 51.

Before the Court dismissed Plaintiff's claims against Defendants John and Daniel Brown, those Defendants moved for sanctions against Plaintiff and his attorney pursuant to Federal Rule of Civil Procedure 11(c). *See* Dkt. No. 89. Plaintiff then cross-moved for sanctions against Defendants John and Daniel Brown and their attorney. *See* Dkt. No. 90.

Currently before the Court are three motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), filed separately by Defendants Smith, Ogden, and the County of Rensselaer (the "County"). *See* Dkt. Nos. 73, 96, 97. Also before the Court are Defendants John and Daniel Brown's motion for sanctions and Plaintiff's cross-motion for sanctions. *See* Dkt. Nos. 89, 90.

II. BACKGROUND[1]

The Court refers the parties to the Prior Decision, which extensively sets forth the factual background and allegations in Plaintiff's complaint. *See* Dkt. No. 114. Accordingly, the Court will provide a brief recitation of the facts and discuss only those allegations that are relevant to disposition of the pending motions.

Defendant Youel C. Smith III, also known as Trey Smith ("Defendant Smith"), was appointed special district attorney of Rensselaer County to prosecute alleged absentee ballot forgeries in the 2009 Troy

[1] The following factual background is taken from Plaintiff's complaint. Any statements contained herein are treated merely as allegations and not as statements of fact.

City elections. *See* Dkt. No. 1 ¶¶ 24-25. Defendant John J. Ogden ("Defendant Ogden") is employed by the New York State Police ("NYSP") and was assigned to assist Defendant Smith in investigating the forgery scheme. *See id.* ¶ 323.

The general allegations in this case surround an alleged scheme to forge and submit false applications for absentee ballots ("AAB") and then file the subsequently forged absentee ballots ("AB"). An AAB is a simple, single-page document that must be signed and completed by the voter or his agent before it can be filed with the Board of Elections. *See id.* ¶ 101. Once an AAB is completed, signed, and filed, an AB and an AB envelope are mailed to the voter or to the voter's AB agent, if one is designated. *Id.* ¶ 102. The AABs require the voter to list a reason for why he or she is eligible to vote absentee ("excuses"). *See id.* ¶ 2.

In the summer of 2009, Defendant Kevin McGrath announced that he was running to take Democratic control of the Working Family Party line for the City of Troy elections. *Id.* ¶ 51. Defendant McGrath and other democratic operatives, including Defendants William McInerney, John Brown, and Daniel Brown, had voters sign AABs without completing the remainder of the form, and then these Defendants completed the AABs with false AB names and excuses, filed them, and obtained the AB for those voters. *See id.* ¶¶ 51-56, 81-88. After receiving the ABs, these Defendants falsely voted with the ABs in forged AB envelopes. *See id.* ¶¶ 56, 80.

Around September of 2009, the forgery scheme was discovered and an action was commenced to invalidate the forged ABs. *See id.* ¶¶ 161-65, 180.

Shortly thereafter, Defendant Richard J. McNally, who was employed as the district attorney of Rensselaer County, disqualified his office from investigating or prosecuting any case related to the AB forgery, and Defendant Smith was appointed as special prosecutor for any further criminal action related to the 2009 AB forgery scheme. *See id.* ¶¶ 27, 229. Plaintiff alleges that Defendant Smith had ample evidence to prosecute other democratic operatives for the 2009 AB forgery scheme, but instead actively conspired to initiate a scapegoat prosecution against Plaintiff in order to shift the negative attention and criminal charges away from the other Defendants. *See id.* ¶¶ 343-45.

As outlined in the Prior Decision, the alleged inadequacies of Defendant Smith's investigation into the other Defendants for the AB forgery include the following: (1) the photograph shown to voters to identify Defendant McInerney was a twenty-year-old photograph, which did not accurately reflect his current appearance; (2) photographs of Defendants John Brown, Daniel Brown, and other democratic operatives were not shown to voters; (3) several key democratic party operatives, including Defendant Renna and Robert Martiniano, were not interviewed for the investigation; (4) certain witnesses were not specifically asked questions about Defendant McInerney's involvement in the AB forgery; (5) the forged AB documents purportedly signed by Defendant McInerney were not examined by a handwriting expert; (6) when presented with significant evidence that Defendant McInerney had participated in AB fraud in the 2007 and 2008 elections, Defendant Smith stated that he did not

have authority to prosecute those actions. *See id.* ¶¶ 364-380, 400, 487, 492-500. Moreover, from 2009 through 2011, Defendant Smith told officials in the NYSP that Defendants McInerney and John Brown could not be prosecuted because the evidence against them "was not legally sufficient to corroborate the testimony of DeFiglio or any accomplice or co-conspirator. . . ." *Id.* ¶ 573.

In September of 2010, Defendant Smith commenced a grand jury proceeding against Plaintiff. *Id.* ¶ 708. Plaintiff alleges that Defendant Smith conspired with several Defendants to present false testimony that implicated Plaintiff instead of the democratic operatives who were actually guilty. *See id.* ¶¶ 740-43, 758-62. Moreover, Defendant Smith prepared and notarized the affidavits of those individuals who did not testify. *Id.* ¶ 815. At trial, two of those voters testified that the signature on their purported affidavit was not genuine. *Id.* ¶ 816; *see also* Dkt. No. 1-1 at 26-30.

On January 28, 2011, Plaintiff was charged by indictment with 38 counts of felony forgery in the second degree and 36 counts of felony criminal possession of a forged instrument in the second degree. *See* Dkt. No. 1 ¶ 809. In April of 2011, Plaintiff contacted the U.S. attorney's office and requested an FBI investigation into his allegedly unlawful prosecution. *See id.* ¶ 929. Between May 25 and August 4, 2011, the NYSP conducted an independent investigation into this matter. *See id.* ¶ 944. That investigation gathered sufficient evidence against Defendant McInerney for the forgery of approximately 50 of the AABs that appeared to be forged in his handwriting. *See id.*

¶ 947. Defendant McInerney was subsequently arrested for the AB forgeries that occurred in 2007 and 2008. *See id.* ¶ 993. Defendant McInerney also pled guilty to one felony count and was sentenced to a 90 day work order in satisfaction of all charges relating to his involvement in the 2009 AB forgery scheme. *See id.* ¶ 971. Plaintiff was ultimately acquitted on December 21, 2012. *See id.* ¶¶ 1199-1200.

Plaintiff alleges that Defendants Smith and Ogden maliciously prosecuted him and also engaged in a conspiracy with other Defendants to effectuate Plaintiff's malicious prosecution. Plaintiff further alleges that the County should also be held liable for Defendants Smith's and McNally's actions. Defendants Smith, Ogden, and the County have moved to dismiss the complaint.

III. DISCUSSION

A. Standard of Review

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the party's claim for relief. *See Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007) (citation omitted). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to

the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002)).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see* Fed. R. Civ. P. 8(a)(2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[,]'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *id.* at 555 (citation omitted), and present claims that are "plausible on [their] face," *id.* at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting [*Twombly*, 550 U.S.] at 557, 127 S. Ct. 1955). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly*, 550 U.S. at 558, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the[ ] complaint must be dismissed[,]" *id.* at 570.

B. General Arguments

While the three Defendants each separately moved to dismiss the complaint on numerous grounds,

several of the arguments are not specific to any individual Defendant. As such, the Court will address those arguments before addressing any Defendant-specific arguments.

1. Rule 8

Each Defendant claims that Plaintiff's 174 page, 1220 paragraph complaint violates the requirement in Fed. R. Civ. P. 8 that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Court addressed this argument in the Prior Decision and found that, while Plaintiff's complaint is undoubtedly a voluminous pleading, it spans almost a four-year period and implicates eleven Defendants and numerous other individuals. Moreover, each Defendant who has responded has been able to understand Plaintiff's allegations enough to present colorable arguments and defenses in opposition. As such, Plaintiff's complaint complies with Rule 8, and Defendants Smith's, Ogden's, and the County's motions to dismiss are denied on this ground. However, it should be noted that the length of Plaintiff's complaint, coupled with the lack of coherent, organized claims, has made analysis of these motions difficult.

2. Statute of Limitations

In the Prior Decision, the Court held that Count I of Plaintiff's complaint alleging a Section 1983 fabrication of evidence claim is barred by the statute of limitations. *See* Dkt. No. 114 at 26. As such, the Court dismissed that claim against all Defendants. *See id.* However, the Court held that Plaintiff's malicious prosecution claim was timely. *See id.* at

22. As such, Plaintiff's remaining claims that the Court will consider in the present motion are Count II (Section 1983 malicious prosecution and conspiracy to commit malicious protection) and Count III (Section 1983 *Monell* claim against the County). *See* Dkt. No. 1 ¶¶ 1214-20.

C. Malicious Prosecution

1. Legal Standard

"The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person—i.e., the right to be free of unreasonable or unwanted restraints on personal liberty." *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995). The elements of malicious prosecution under Section 1983 effectively mirror the elements of the same claim under New York law. *See Hygh v. Jacobs*, 961 F.2d 359, 366 (2d Cir. 1992) (citations omitted). Accordingly, to state a cause of action for malicious prosecution in New York, the plaintiff must allege "(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions." *Jocks v. Tavernier*, 316 F.3d 128, 136 (2d Cir. 2003) (quotation omitted).

"Probable cause, in the context of malicious prosecution, has . . . been described as such facts and circumstances as would lead a reasonably prudent person to believe the plaintiff guilty." *Stansbury v. Wertman*, 721 F.3d 84, 95 (2d Cir. 2013) (quoting *Boyd v. City of New York*, 336 F.3d 72, 76 (2d Cir.

2003)). Courts look at the "totality of the circumstances" to determine if probable cause exists. *See id.* at 89. "[T]he existence of probable cause is a complete defense to a claim of malicious prosecution in New York." *Manganiello v. City of New York*, 612 F.3d 149, 161-62 (2d Cir. 2010) (quoting *Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003)). "Probable cause may . . . exist where the officer has relied on mistaken information, so long as it was reasonable for him to rely on it. However, 'the failure to make a further inquiry when a reasonable person would have done so may be evidence of lack of probable cause.'" *Id.* at 161 (quoting *Colon v. City of New York*, 60 N.Y.2d 78, 82 (1983)) (internal citation omitted). Moreover, "indictment by a grand jury creates a presumption of probable cause that may *only* be rebutted by evidence that the indictment was procured by 'fraud, perjury, the suppression of evidence or other [official] conduct undertaken in bad faith.'" *Savino*, 331 F.3d at 72 (quoting *Colon*, 60 N.Y.2d at 83). Finally, the lack of probable cause alone "generally creates an inference of malice." *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 131 (2d Cir. 1997).

To sustain a malicious prosecution claim under Section 1983, "the state law elements must be met, and there must also be a showing of a 'sufficient post-arraignment liberty restraint ') implicate the plaintiff's Fourth Amendment rights.'" *Rutigliano v. City of New York*, 326 Fed. Appx. 5, 8-9 (2d. Cir. 2009) (quotation omitted). As the Second Circuit has stated,

> The Fourth Amendment right implicated in a malicious prosecution action is the right to be

> free of unreasonable seizure of the person—i.e., the right to be free of unreasonable or unwarranted restrains on personal liberty. A plaintiff asserting a Fourth Amendment malicious prosecution claim under § 1983 must therefore show some deprivation of liberty consistent with the concept of "seizure."

Rohman v. N.Y.C. Transit Auth., 215 F.3d 208, 215 (2d Cir. 2000) (quoting *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995)). Thus, a plaintiff pursuing a malicious prosecution claim "under § 1983 must show that the seizure resulted from the initiation or pendency of judicial proceedings." *Id.*

2. Defendant Smith[2]

At the outset, Defendant Smith is entitled to Eleventh Amendment immunity for all claims against him in his official capacity. The Eleventh Amendment provides a state with sovereign immunity from suit. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011) (citation omitted). "To the extent that a state official is sued for damages in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state." *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993) (citations omitted). Here, since Plaintiff sued Defendant Smith for damages in his official capacity, that is deemed to be a suit against the

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[2] The Court will not consider the self-serving affidavit or additional evidence that Defendant Smith submitted with this motion *See Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000).

state, and Defendant Smith is entitled to Eleventh Amendment immunity. The Court notes that Defendant Smith did not raise this defense in his motion to dismiss, but "lower courts may raise the issue of Eleventh Amendment immunity sua sponte." *Woods v. Rondout Valley Central School Dist. Bd of Educ.*, 466 F.3d 232, 238 (2d Cir. 2006). Accordingly, all claims against Defendant Smith in his official capacity are dismissed.

With respect to Defendant Smith's individual liability, Plaintiff clearly pleads the first two elements of a malicious prosecution claim. Defendant Smith commenced a grand jury proceeding against Plaintiff in September of 2010. *See* Dkt. No. 1 ¶ 708. Plaintiff was indicted and charged with 74 felony counts and then arrested on January 28, 2011. *See id.* ¶¶ 2, 1199. Defendant Smith continued the prosecution of Plaintiff in the Rensselaer County Supreme Court until Plaintiff was ultimately acquitted of all charges on December 21, 2012. *See id.* ¶¶ 1190, 1200; *see also Phillips v. DeAngelis*, 571 F. Supp. 2d 347, 353 (N.D.N.Y. 2008) (citing *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)) ("The requirement that a plaintiff show an initiation or continuation of a criminal proceeding by the defendant may be satisfied by a showing that the defendants filed formal charges and caused the plaintiff to be arraigned").

Turning to the third element, Defendant Smith claims that he had probable cause to commence the proceeding, and that Plaintiff has not sufficiently rebutted the presumption of probable cause created by a grand jury indictment. *See* Dkt. No. 96-2 at 9-12. The Court held in the Prior Decision that

Plaintiff has sufficiently rebutted the presumption of probable cause that a grand jury indictment creates. *See* Dkt. No. 114 at 28. The Court noted that Plaintiff's indictment was based, in part, upon affidavits from voters who claimed that their AABs had been falsified, which were prepared and notarized by Defendant Smith. *See id.*; Dkt. No. 1 ¶¶ 813, 815. At trial, two of the voters whose affidavits were presented at the grand jury proceeding allegedly testified that the signature on their purported affidavits was not genuine. *See* Dkt. No. 114 at 28; Dkt. No. 1 ¶ 816; *see also* Dkt. No. 1-1 at 26-30. The Court also noted the alleged false testimony of Defendant Ogden, who testified that the forged AABs were all falsified by the same person, but later admitted that his testimony was not correct. *See* Dkt. No. 114 at 28. The Court further noted that Defendant O'Malley first testified that he wrote excuses on several AABs, which he testified probably came from the AB candidate who got the information from a democratic committee operative. *See id.*; Dkt. No. 1 ¶ 772. Plaintiff alleges that Defendant Smith called Defendant O'Malley at his home and encouraged him to change his testimony and instead testify that Plaintiff directed him to make up excuses and write them on the AABs. *See* Dkt. No. 114 at 28; Dkt. No. 1 ¶¶ 783-84. Defendant O'Malley allegedly changed his testimony in this manner. *See* Dkt. No. 1 ¶ 783. The Court held that based on these allegations of forgery, untruthful testimony, and suppression of evidence, Plaintiff has sufficiently rebutted the presumption of probable cause that a grand jury indictment creates. *See Boyd v. City of New York*, 336 F.3d 72, 76 (2d Cir. 2003) ("The presumption is rebuttable, and may be

overcome by evidence establishing that the police witnesses 'have not made a complete and full statement of facts . . . that they have misrepresented or falsified evidence . . . or otherwise acted in bad faith.'") (quoting *Colon v. City of New York*, 60 N.Y.2d 78, 82 (1983)).

Although Plaintiff has rebutted the presumption of probable cause, he still must sufficiently allege that Defendant Smith lacked probable cause to commence the proceeding. Plaintiff alleges that, through Defendant Smith's investigation, he had sufficient evidence to prosecute Defendants McGrath, McInerney, John Brown, and Anthony DeFiglio for the AB forgery. *See* Dkt. No. 1 ¶¶ 335, 337. Specifically, Defendant Smith allegedly obtained numerous AB forged documents and the testimony of more than fifty witnesses, many of whom implicated Defendant McInerney in the forgery scheme. *Id.* ¶ 336. Plaintiff alleges that Mr. DeFiglio "admitted to Trey Smith and Ogden in October or November 2009 that the 2009 AB forgery was committed principally by McInerney and Brown and that [democratic candidates and operatives] had engaged in the same AB forgery scheme . . . for at least the prior 25 years. . . ." *Id.* ¶ 107. Plaintiff further alleges that Defendant Smith knew that Defendant McGrath was implicated in the forgery scheme based on the inconsistencies between Defendant McGrath's claims and the information provided by voters. *Id.* ¶¶ 624-26. For example, Marc Welch, a voter, claimed that Defendant McGrath had him sign an AAB, but Marc Welch ended up voting in person instead, even though an AB was filed on his behalf. *See id.* ¶ 624(e). Likewise, John Gilbert, a voter,

claimed that he did not sign an AAB, but Defendant McGrath claimed that Mr. Gilbert gave him permission to vote his AB. *See id.* ¶ 624(c). Plaintiff alleges several other examples of inconsistences that seemingly implicated Defendant McGrath. *See id.* ¶ 624. Moreover, Plaintiff alleges that in November of 2010, Rensselaer County Board of Elections Commissioner Lawrence Bugbee ("Commissioner Bugbee") provided Defendant Smith with twenty AABs filed in 2007 and 2008 that had been forged in the same unique handwriting, which Commissioner Bugbee allegedly identified as Defendant McInerney's handwriting. *See id.* ¶¶ 491-93. Commissioner Bugbee also allegedly told Defendant Smith that the 2009 AB documents were also forged by Defendants McInerney and McGrath. *See id.* ¶ 490.

Rather than follow this evidence, Defendant Smith allegedly targeted Plaintiff for the forgery case. Plaintiff alleges that Defendant Smith told Defendants McInerney and John Brown that they would not be prosecuted for the AB forgery. *See id.* ¶ 266. From 2009 through 2011, Defendant Smith allegedly told officials in the NYSP that Defendants McInerney and John Brown could not be prosecuted because the evidence against them "was not legally sufficient to corroborate the testimony of DeFiglio or any accomplice or co-conspirator. . . ." *Id.* ¶ 573. Plaintiff alleges that during the investigation of the AB fraud, Defendant Smith had officers in the NYSP show voters a picture of Defendant McInerney that was over twenty years old and that did not accurately depict his physical appearance at that time. *Id.* ¶ 364. As such, voters could not identify

the perpetrator as Defendant McInerney. *Id.* ¶ 365. Moreover, Plaintiff alleges that Defendant Smith did not depose any other employee of the Rensselaer County Board of Elections "because it would have required [Defendant] O'Malley to give a false statement in furtherance of the conspiratorial prosecution and exposed the scheme at that time." *Id.* ¶ 451. Plaintiff further alleges that Defendant Smith did not perform a "relatively quick and inexpensive ink analysis" on the fourteen AABs that were filed on September 10, 2009 "because this evidence alone would have exonerated [Plaintiff], disproved the prosecution theory and proved the falsity of the testimony of [Defendants] Robillard, Ogden, and McGrath." *Id.* ¶ 902.

Overall, Plaintiff contends that Defendant Smith

> pretentiously adopted and pursued a preposterous prosecution theory he knew was wrong; buried crucial testimony of DeFiglio and other witnesses; did not seek readily available evidence or the truthful cooperation of any perpetrator; accepted the self-serving incredible false assertions of many suspects implicated in the crimes; immunized or gave extraordinary favorable cooperation agreements to many suspects implicated in the crimes; purposely ignored material evidence; and fabricated false evidence against McDonough.

Id. ¶ 345.

In response, Defendant Smith argues that he had probable cause to commence the proceeding. *See* Dkt. No. 96-2 at 11. However, in his memorandum of law, Defendant Smith largely cites to material

outside of the complaint to support his assertion that he had probable cause. *See id.* The Court will not consider such material at the motion to dismiss stage.[3] *See Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000).

Plaintiff alleges that the only evidence Defendant Smith had to prosecute Plaintiff was an accusation by Defendant McGrath that was proven false, *see* Dkt. No. 1 ¶¶ 620-24, 714, a purported conversation between Defendant Smith and John Brown about AB agent names, *see id.* ¶ 714, and the finding of Plaintiff's DNA on three envelopes that contained forged ABs, *see id.* Plaintiff claims that Defendant Smith knew that Defendant McGrath's accusation was proven false by the voter affidavits and AB documents. *See id.* ¶¶ 623-24. With respect to the DNA finding, Plaintiff claims that his DNA was not found on the envelopes until after Defendant Smith proposed new extraction methods to be performed in the presence of Defendants Smith and Ogden. *See id.* ¶¶ 694, 697. Plaintiff further claims that he

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[3] Specifically, Defendant Smith relies on a sworn statement given by Defendant McGrath to the NYSP and the grand jury testimony of several witnesses. *See* Dkt. No. 96-2 at 11-12. When ruling on a motion to dismiss, a court may consider "documents 'integral' to the complaint and relied upon in it, even if not attached or incorporated by reference, [and] documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint." *See Knox v. Countrywide Bank*, 4 F. Supp. 3d 499, 513 (E.D.N.Y. 2014) (citing *Nasso v. Bio Reference Labs., Inc.*, 892 F Supp. 2d 439, 446 (E.D.N.Y. 2012)). Here, these documents are not "integral" to the complaint, nor is there any indication that Plaintiff relied on them in drafting his complaint. As such, the Court will not consider them at the motion to dismiss stage.

recalled helping Defendant Renna file two AABs and insert the AB into envelopes, but that he did not falsely vote or forge any AB envelopes. *See id.* ¶¶ 699-701. Although Plaintiff's DNA was found on three of the envelopes, considering Plaintiff's allegations that his DNA was not found until after Defendant Smith arrived at the crime lab and proposed new extraction methods, coupled with Plaintiff's theory that Defendant Smith fabricated other evidence and influenced testimony to implicate Plaintiff, the Court finds that the DNA results alone did not give Defendant Smith probable cause to prosecute Plaintiff.

The Court notes that, based on the exhibits in Plaintiff's complaint, Defendant Smith also had a statement from Anthony DeFiglio, a former clerk for the City of Troy Housing Authority, that possibly implicated Plaintiff. Mr. DeFiglio claimed that, with respect to the AB forgery scheme, "I know that there is no possible way that the Democratic Commissioner of the [Board of Elections], [Plaintiff], could not have known what was happening." Dkt. No. 1-1 at 12. This statement was given on November 6, 2009, before Defendant Smith commenced any proceedings against Plaintiff. *See id.* However, this is the only statement made by Mr. DeFiglio pertaining to Plaintiff, and appears to be merely speculative and provides no specific evidence against Plaintiff. Moreover, Plaintiff has sufficiently alleged that Defendants Smith and Ogden asked Mr. DeFiglio pointed questions in an attempt to implicate Plaintiff and not other democratic operatives. *See* Dkt. No. 1 ¶¶ 536-42. Plaintiff has also alleged that Mr. DeFiglio disclosed to Defendant Smith that

Defendant McInerney was largely involved in the AB fraud, but Defendant Smith ignored that evidence. *See id.* ¶¶ 546-53. As such, Mr. DeFiglio's conclusory statement potentially implicating Plaintiff did not give Defendant Smith probable cause.

Considering Plaintiff's numerous specific allegations that Defendant Smith targeted Plaintiff despite ample evidence implicating other Defendants and political operatives, the Court finds that, considering the totality of the circumstances, Plaintiff has sufficiently alleged that Defendant Smith lacked probable cause to prosecute Plaintiff.

Turning to the fourth element, "[a] lack of probable cause generally creates an inference of malice." *Boyd*, 336 F.3d at 78 (citing *Ricciuti*, 124 F.3d at 131). As discussed above, Plaintiff's allegations that Defendant Smith initiated a "scapegoat prosecution" against Plaintiff to shield other political candidates from prosecution are sufficient to satisfy the malice requirement.

Plaintiff must also allege a "sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights." *Rutigliano v. City of New York*, 326 Fed. Appx. 5, 8-9 (2d. Cir. 2009) (quoting *Rohman v. N.Y.C. Transit Auth.*, 215 F.3d 208, 215 (2d Cir. 2000)). The Court found in the Prior Decision that Plaintiff met this element. *See* Dkt. No. 114 at 29-30. The Court noted that Plaintiff was required to endure two separate trials and was not acquitted of the charges against him until nearly two years until after he was indicted. *See* Dkt. No. 1 ¶¶ 1199-1200. These allegations clearly state that Plaintiff suffered a restraint on his liberty that extended beyond the arraignment itself. *See*

Rohman, 215 F.3d at 216 (holding that a plaintiff who was required "to return to court on at least five occasions before the charges against him were ultimately dropped[,]" coupled with the fact that a New York criminal defendant released on his own recognizance "must 'render himself at all times amenable to the orders and processes of the court,'" was sufficient to allege a post-arraignment liberty restraint).

Accordingly, the Court finds that Plaintiff has sufficiently alleged facts to support a Section 1983 malicious prosecution claim against Defendant Smith.

3. Absolute Prosecutorial Immunity

Defendant Smith argues that he is entitled to absolute prosecutorial immunity that cannot be compromised by general allegations of fraud and conspiracy. *See* Dkt. No. 96-2 at 13-14. Defendant Smith asserts that "plaintiff's conclusory and extravagant allegations of conspiracy is [sic] merely a device . . . to circumvent [Defendant Smith's] entitlement to absolute immunity on each of plaintiff's claims." *Id.*

"Prosecutors are entitled to absolute immunity when they engage in activities 'intimately associated with the judicial phase of the criminal process,' *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), and done 'in the course of [their] role as . . . advocate[s] for the State,' *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)." *Kent v.Cardone*, 404 Fed. Appx. 540, 542 (2d Cir. 2011). The Second Circuit uses a "functional approach" to determine whether an action is prosecutorial, which considers "the nature of the function performed, not the identify of the

actor who performed it." *Id.* (quoting *Burns v. Reed*, 500 U.S. 478, 486-87 (1991)). The Supreme Court has provided the following guidance to determine whether an action is prosecutorial:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other. Thus, if a prosecutor plans and executes a raid on a suspected weapons cache, he has no greater claim to complete immunity than activities of police officers allegedly acting under his direction.

Kalina v. Fletcher, 522 U.S. 118, 126 (1997) (citations and internal quotation marks omitted). As such, a prosecutor receives absolute immunity for acts done as an advocate, while acts done in an investigatory capacity are entitled to only qualified immunity. *See Zahrey v. Coffey*, 221 F.3d 342, 346-47 (2d Cir. 2000).

As the Second Circuit has stated, "[t]he line between a prosecutor's advocacy and investigating roles might sometimes be difficult to draw." *Id.* at 347 (citing *Hill v. City of New York*, 45 F.3d 653, 662-63 (2d Cir. 1995)). The Supreme Court has heard several cases on this distinction between a prosecutor's role as advocate and investigator, and

has held that absolute immunity applies when a prosecutor appears and presents evidence at a probable cause hearing, *see Burns*, 500 U.S. at 492, and when a prosecutor prepares and files charging documents, *see Kalina*, 522 U.S. at 129. The Supreme Court has held that absolute immunity does not apply when a prosecutor gives legal advice to police officers, *see Burns*, 500 U.S. at 492-94, when a prosecutor makes statements to the media, *see Buckley*, 509 U.S. at 277-78, and when a prosecutor acts as a complaining witness to satisfy probable cause for a warrant application, *see Kalina*, 522 U.S. at 129-31. The Second Circuit has also noted that "[t]he majority opinion in [*Buckley*] suggests that a prosecutor's conduct prior to the establishment of probable cause should be considered investigative: '[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.'" *Zahrey*, 221 F.3d at 347 n.2 (quoting *Buckley*, 509 U.S. at 274).

The Second Circuit has also drawn a further distinction with respect to investigative acts:

> [T]he pre-litigation function that a prosecutor performs has at least two aspects: (1) the supervision of and interaction with law enforcement agencies in *acquiring* evidence which might be used in a prosecution, and (2) the *organization, evaluation, and marshalling* of this evidence into a form that will enable the prosecutor to try a case or to seek a warrant, indictment, or order. While both of these categories of activities occur before the commencement of formal legal proceedings, and therefore may be loosely

> termed "investigative," we believe that the first category consists of actions that are of a police nature and are not entitled to absolute protection.

Barbera v. Smith, 836 F.2d 96, 100-01 (2d Cir. 1987) (citations omitted).

Alleging that a prosecutor acted in a conspiracy to deprive a plaintiff certain rights does not remove absolute immunity protection that the prosecutor receives. *Pinaud v. Cnty. of Suffolk*, 52 F.3d 1139, 1148 (2d Cir. 1995). The Second Circuit has explained that "[t]he fact that such a conspiracy is certainly not something that is *properly* within the role of a prosecutor is immaterial, because 'the immunity attaches to his function, not to the manner in which he performed it.'" *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994) (quoting *Barrett v. United States*, 798 F.2d 565, 573 (2d Cir. 1986)). Moreover, the Second Circuit has held that an absolute immunity defense can often be resolved at the motion to dismiss stage because the defense depends on the nature of the function being performed by the defendant, which "is often clear from the face of the complaint." *Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005) (citations omitted).

Since the initiation of a prosecution is an essential element of a malicious prosecution claim, and since prosecutors have absolute immunity for actions taken in their role as advocates, prosecutors generally have absolute immunity from malicious prosecution claims. *See id.* at 237 ("Because the immunity attaches to the official prosecutorial function, *see, e.g.*, *Imbler*, 424 U.S. at 430, 96 S. Ct. 984, and because the initiation and pursuit of a

criminal prosecution are quintessential prosecutorial functions, *see id.*, the prosecutor has absolute immunity for the initiation and conduct of a prosecution 'unless [he] proceeds in the clear absence of all jurisdiction.'") (quoting *Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987)); *Del Col v. Rice*, No. 11 CV 5138, 2012 WL 6589839, *5 (E.D.N.Y. Dec. 18, 2012) (" '[I]t is well-established in the Second Circuit that claims of malicious prosecution' relate to a prosecutors' role as an advocate; and, thus, prosecutors are absolutely immune from malicious prosecution claims.") (quoting *McKeon v. Daley*, 101 F. Supp. 2d 79, 87 (N.D.N.Y. 2000)), *aff'd*, 8 Fed. Appx. 138 (2d Cir. 2001). In the present matter, unless Defendant Smith acted in clear absence of all jurisdiction, he is absolutely immune from Plaintiff's malicious prosecution claim. Plaintiff argues that Defendant Smith's appointment was invalid, but Plaintiff has provided no argument that this Court has subject matter jurisdiction over those claims.[4]

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[4] Plaintiff asserts that, since Defendant Smith's appointment as special prosecutor was unlawful and invalid, Defendant Smith had no legal authority to prosecute Plaintiff. *See* Dkt. No. 1 ¶¶ 229-35; Dkt. No. 108 at 14-16. On September 28, 2009, Judge Robert M. Jacon of the Rensselaer County Court executed an order appointing Defendant Smith as special prosecutor. *See* Dkt. No. 1 ¶ 232; Dkt. No. 99-3 at 2. It appears from the complaint that Plaintiff moved to disqualify Defendant Smith in 2011 but Defendant Smith successfully opposed Plaintiff's motion. *See* Dkt. No. 1 ¶¶ 859-60. It is not entirely clear how Plaintiff attempted to disqualify Defendant Smith, but to the extent that Plaintiff lost in state court and is now attempting to relitigate that case in federal court, those claims are barred by the *Rooker-Feldman* doctrine. *See Exxon Mobile Corp., v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005) (holding that federal courts do not have jurisdiction to hear "cases brought by state-court losers complaining of injuries

Moreover, to the extent that Plaintiff argues that Defendant Smith acted in the absence of jurisdiction because he knew that Plaintiff was innocent but still continued the prosecution, the Second Circuit has rejected that argument. *See Shmueli*, 424 F.3d at 238-39. Accordingly, since Defendant Smith is entitled to absolute immunity, his motion to dismiss Plaintiff's malicious prosecution claim is granted.

Defendant Smith is also entitled to absolute immunity from Plaintiff's conspiracy to commit malicious prosecution claim. "[I]t is also well established that absolute prosecutorial immunity extends to conspiracy allegations." *Covington v. City of New York*, 916 F. Supp. 282, 287 (S.D.N.Y. 1996). Since Defendant Smith has absolute immunity from Plaintiff's malicious prosecution claim, he is also immune from Plaintiff's conspiracy to commit malicious prosecution claim. *See Pinaud*, 52 F.3d at 1148 ("As this Court and other circuits have repeatedly held, since absolute immunity covers 'virtually all acts, regardless of motion,

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caused by state-court judgments rendered before the district court proceeding commenced and inviting district court review and rejection of those judgments"). Moreover, Plaintiff relies on *Working Families Party v. Fisher*, 23 N.Y.3d 539 (2014) to support the merits of his claim, but in that case, the New York Court of Appeals held that a N.Y.C.P.L.R. Article 78 proceeding was an appropriate remedy to void the improper appointment of a special prosecutor. *See Working Families Party v. Fisher*, 23 N.Y.3d 539, 544 (2014) Here, it appears that Plaintiff's claims regarding Defendant Smith's appointment are merely an attempt to appeal a state-court order or relitigate a state-court proceeding, and Plaintiff has provided no argument that this Court has jurisdiction to hear those claims. As such, the Court will not entertain Plaintiff's claims that Defendant Smith's appointment was invalid.

associated with [the prosecutor's] function as an advocate,' [*Dory*, 25 F.3d at 83], when the underlying activity at issue is covered by absolute immunity, the 'plaintiff derives no benefit from alleging a conspiracy.'") (quoting *Hill*, 45 F.3d at 659 n.2); *Rehberg v. Paulk*, 611 F.3d 828, 854 (11th Cir. 2010) ("A prosecutor cannot be liable for 'conspiracy' to violate a defendant's constitutional rights by prosecuting him if the prosecutor also is immune from liability for actually prosecuting the defendant.") (citation omitted); *Reasonover v. St. Louis Cty., Mo.*, 447 F.3d 569, 580 (8th Cir. 2006) ("[A] prosecutor is absolutely immune from a civil conspiracy charge when his alleged participation in the conspiracy consists of otherwise immune acts.") (citation omitted). Accordingly, to the extent that Plaintiff alleges a conspiracy to commit malicious prosecution claim against Defendant Smith, that claim is dismissed.

The Court acknowledges that Plaintiff has sufficiently alleged that some of Defendant Smith's actions were taken in an investigative role, and thus would not be entitled to absolute immunity. Plaintiff alleges that Defendant Smith instructed the NYSP investigators to show voters a twenty-year-old photograph of Defendant McInerney so that voters would not be able to identify him as the individual who had them sign their AABs. *See* Dkt. No. 1 ¶¶ 364-65. Plaintiff also alleges that Defendant Smith never showed voters photographs of Defendants John and Daniel Brown or any other democratic operative allegedly involved in the fraud. *See id.* ¶ 366. Likewise, before Defendant Smith commenced a grand jury proceeding, he allegedly did

not hire a law enforcement forensic document examiner or handwriting expert to analyze the AABs in fear that a handwriting analysis would exonerate Plaintiff. *See id.* ¶¶ 667-70. These actions were all taken before Plaintiff's indictment and before Defendant Smith had probable cause to prosecute Plaintiff. As the Supreme Court has stated, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274.

Moreover, Plaintiff alleges that Defendant Smith misled the NYSP investigators into believing that Defendants McInerney, John Brown, and Renna could not be prosecuted in an attempt to thwart any investigation of those Defendants. *See* Dkt. No. 1 ¶¶ 350, 576. Plaintiff claims that, once Senior Investigator O'Brien of the NYSP initiated an independent investigation into the AB fraud, Defendants Smith and Ogden orchestrated a false personnel complaint against O'Brien in an effort to quash the independent investigation. *See id.* ¶¶ 1067-69. Plaintiff also alleges that Defendant Smith attempted to influence the FBI investigation by leaking the name of the FBI agent conducting the investigation to impair his ability to talk to witnesses and suspects. *See id.* ¶¶ 934-37.

However, as discussed above, the distinction between a prosecutor's investigative and prosecutorial functions is immaterial with respect to a malicious prosecution claim, since prosecutors are generally immune from such claims. If Plaintiff's fabrication of evidence claim was timely, or if Plaintiff asserted other claims against Defendant Smith that did not involve his role as an advocate,

then the distinction between investigative and prosecutorial acts would be relevant. Since Plaintiff's only remaining claim is for malicious prosecution and since Defendant Smith has absolute immunity from that claim, Defendant Smith is hereby dismissed from this action.

4. Defendant Ogden

Plaintiff has failed to allege that Defendant Ogden is directly responsible for his malicious prosecution. Plaintiff alleges that Defendant Smith was the one who initiated the prosecution of Plaintiff. *See* Dkt. No. 1 ¶¶ 322-23, 708. A police officer may be found liable for malicious prosecution if he "continued" the prosecution of a plaintiff, but "[o]nce control of a prosecution has passed to a prosecuting attorney, a police officer may only be liable for 'continuing' the prosecution if he or she '[insists] upon or [urges] further prosecution.'" *Burt v. Aleman*, No. 05-CV-4493, 2008 WL 1927371, *5 (E.D.N.Y. Apr. 30, 2008) (quoting *Dirienzo v. United States*, 690 F. Supp. 1149, 1158 (D. Conn. 1988)). Plaintiff alleges that Defendant Smith was in control of the prosecution and much of the investigation, and that Defendant Smith initiated and directed the alleged scapegoat prosecution of Plaintiff. Defendant Smith became involved in the investigation several weeks before Defendant Ogden did. *See* Dkt. No. 1 ¶¶ 322-23. Although Plaintiff claims that Defendants Smith and Ogden worked closely together during the investigation, many of Defendant Ogden's actions were taken alongside Defendant Smith or at the behest of Defendant Smith. For example, Plaintiff alleges that Defendant Smith directed Defendant Ogden to interview Plaintiff and take written

depositions several times. *See* Dkt. No. 1 ¶¶ 472-73. Plaintiff further alleges that Defendant Ogden's grand jury testimony was fabricated in conspiracy with Defendant Smith. *See id.* ¶¶ 758-61. However, Plaintiff does not allege that Defendant Ogden was the one insisting or urging Defendant Smith to continue the prosecution.

Moreover, Defendant Ogden is entitled to absolute immunity for his grand jury and trial testimony. *See Coggins v. Cnty. of Nassau*, 988 F. Supp. 2d 231, 244 (E.D.N.Y. 2013) (citing *Briscoe v. LaHue*, 460 U.S. 325, 335-36 (1983)). Of course, a grand jury witness does not receive absolute immunity for all actions arising out of the substance testified about. *See Coggins v. Buonora*, 776 F.3d 108, 112-13 (2d Cir. 2015). In *Coggins*, the Second Circuit held that a plaintiff may state a valid malicious prosecution claim against a grand jury witness, even with absolute immunity for the testimony given in such proceeding, if the plaintiff alleges actions taken in excess of that witness' testimony that would amount to an independent Section 1983 claim. *Id.* at 113. However, in the present matter, Plaintiff has not stated a valid malicious prosecution claim against Defendant Ogden.

The Court notes that Defendant Ogden did not raise an absolute immunity defense, but Plaintiff himself acknowledges that Defendant Ogden is entitled to absolute immunity for his testimony. *See* Dkt. No. 86 at 9. Instead, Plaintiff argues that Defendant Ogden should be liable for his investigative acts performed "outside the judicial process." *See id.* at 14. As discussed above, the Court has considered the actions taken by Defendant

Ogden outside of his testimony, and Plaintiff has not sufficiently alleged a malicious prosecution claim against him.

Accordingly, to the extent that Plaintiff's complaint contains a direct cause of action for malicious prosecution against Defendant Ogden, any such claim is dismissed.

D. Section 1983 Conspiracy

1. Legal Standard

Plaintiff alleges that Defendants Ogden and Smith conspired to maliciously prosecute Plaintiff. *See* Dkt. No. 1 ¶ 1215. To state a Section 1983 conspiracy claim, the complaint must allege "(1) an agreement between two or more state actors or between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999) (citing *Carson v. Lewis*, 35 F. Supp. 2d 250, 271 (E.D.N.Y. 1999)). Thus, a plaintiff must first allege sufficient facts to support an underlying constitutional violation in order to state a valid Section 1983 conspiracy claim. *See Curley v. Vill. of Suffern*, 268 F.3d 65, 72 (2d Cir. 2001). Moreover, "[w]hile 'conclusory allegations' of a § 1983 conspiracy are insufficient, we have recognized that such 'conspiracies are by their very nature secretive operations,' and may have to be proven by circumstantial, rather than direct, evidence." *Pangburn*, 200 F.3d at 72 (quoting *Dwares v. City of New York*, 985 F.2d 94, 99-100 (2d Cir. 1993); *Rounseville v. Zahl*, 13 F.3d 625, 632 (2d Cir. 1994)).

In the instant case, the alleged unconstitutional injury implicated by the conspiracy is based on a claim of malicious prosecution. As discussed above, Plaintiff has adequately pled facts to support a malicious prosecution claim. However, Plaintiff has only alleged that Defendant Smith is directly responsible for Plaintiff's malicious prosecution, and Defendant Smith is entitled to absolute immunity from that claim. As such, the Court is faced with the question of whether Plaintiff can sustain a Section 1983 conspiracy claim based on his alleged constitutional violation even though the underlying Section 1983 claim itself fails due to absolute immunity. In other words, the question is whether Defendants Ogden and McInerney, who are not protected by absolute immunity from Plaintiff's malicious prosecution claim, can be held liable for conspiring with Defendant Smith, who is protected by absolute immunity, even though the underlying claim has been dismissed on immunity grounds.

Courts generally dismiss Section 1983 conspiracy claims when the underlying Section 1983 claim is dismissed. The reason for this is that "a civil conspiracy claim 'does not set forth an independent cause of action' but rather is 'sustainable only after an underlying . . . claim has been established.'" *DeMartino v. New York State Department of Labor*, 177 F. Supp. 3d 342, 373 (E.D.N.Y. 2016) (quoting *Clark v. City of Oswego*, No. 03-CV-202, 2007 WL 925724, *7 (N.D.N.Y. Mar. 26, 2007)) (alteration omitted). Most cases that have dismissed Section 1983 conspiracy claims dismiss them because the plaintiff failed to sufficiently establish a constitutional violation. *See, e.g., id.*; *Curley*, 268

F.3d at 72 ("Since plaintiff cannot establish a claim for false arrest or the use of excessive force, he may not maintain a § 1983 cause of action for conspiracy.") (citation omitted); *Mitchell v. County of Nassau*, 768 F. Supp. 2d 545, 561-64 (E.D.N.Y. 2011) ("However, a § 1983 conspiracy claim fails as a matter of law where there is no underlying constitutional violation.") (citations omitted); *Tirse v. Gilbo*, 6:15-CV-0987, 2016 WL 4046780, *18 (N.D.N.Y. July 27, 2016) (dismissing the plaintiff's Section 1983 conspiracy claims after finding that the plaintiff failed to sufficiently allege the underlying Section 1983 claims) (citations omitted). The present case is distinguishable because Plaintiff has sufficiently alleged that he suffered a constitutional violation, but the only Defendant directly responsible for that violation is shielded by immunity.

In *Dennis v. Sparks*, 449 U.S. 24 (1980), the Supreme Court held that private parties can still be liable for a Section 1983 conspiracy claim for conspiring with a judge, even though judges are entitled to absolute immunity. *See Dennis v. Sparks*, 449 U.S. 24, 28-29 (1980). Although that case does not directly answer the question in this context of whether a plaintiff can sustain a Section 1983 conspiracy claim when the underlying claims have been dismissed on immunity grounds, other courts relying on *Dennis* have concluded that such conspiracy claims should not be dismissed. In a Southern District of New York case involving a conspiracy claim against a judge entitled to immunity, the district court originally dismissed all of the plaintiff's claims, including the plaintiff's Section 1983 conspiracy claim. *See Carvel v. New*

York State, No. 08 Civ. 3305, 2010 WL 1404154, *1 (S.D.N.Y. Apr. 6, 2010) (explaining that the court originally dismissed all of the plaintiff's claims). However, the Second Circuit, in a summary order citing *Dennis*, held that the plaintiff could still sustain a Section 1983 conspiracy claim against the other defendants even though the judge was entitled to immunity, and thus remanded the case for the district court to consider only the plaintiff's Section 1983 conspiracy claim. *See Carvel v. New York*, 369 Fed. Appx. 269, 270 (2d Cir. 2010). Although the district court ultimately dismissed that case due to the plaintiff's failure to sufficiently allege a conspiracy claim, the clear implication from that case is that a plaintiff may assert a Section 1983 conspiracy claim even if the underlying claims have been dismissed on immunity grounds. *See Carvel v. Scarpino*, No. 08 Civ. 3305, 2010 WL 5174392, *7-10 (S.D.N.Y. Dec. 16, 2010). Likewise, in *Douglas v. New York State Adirondack Park Agency*, 895 F. Supp. 2d 321 (N.D.N.Y. 2012), the district court faced the question of whether private parties can be liable for conspiring with a prosecutor to maliciously prosecute the plaintiff. *See Douglas v. New York State Adirondack Park Agency*, 895 F. Supp. 2d 321, 359 n.27 (N.D.N.Y. 2012). The court, relying on *Dennis*, concluded that the prosecutor's immunity did not bar the liability of a co-conspirator with respect to the malicious prosecution claim. *See id.* Although the plaintiff in that case sufficiently alleged other constitutional violations such that the underlying Section 1983 claims were not dismissed, that case held that a prosecutor's immunity should not also shield co-

conspirators from a malicious prosecution claim. *See id.*

Moreover, the Court notes that the elements for a conspiracy claim do not require that an underlying Section 1983 claim exist—only that the state actors enter into an agreement to inflict an unconstitutional injury, and an overt act in furtherance of that agreement causing damages. *Pangburn*, 200 F.3d at 72. As discussed above, normally in a conspiracy case an underlying Section 1983 claim exists, but in this case, Plaintiff has sufficiently alleged an unconstitutional injury despite the dismissal of Plaintiff's underlying Section 1983 claim. Considering that Plaintiff has sufficiently alleged a constitutional violation, the Court finds that it is possible for Plaintiff to sufficiently allege a Section 1983 conspiracy to commit malicious prosecution claim, even though the underlying claim has been dismissed on immunity grounds. Concluding otherwise would result in Defendant Smith's prosecutorial immunity also shielding Defendants Ogden and McInerney from liability on Plaintiff's conspiracy claims, even though those Defendants did not act in a prosecutorial role.

Turning to the merits of Plaintiff's Section 1983 conspiracy claim against Defendant Ogden, Plaintiff sufficiently alleges that Defendants Smith and Ogden conspired together in the alleged malicious prosecution of Plaintiff. At the outset, both Defendant Smith—a special prosecutor, and Defendant Ogden—a NYSP investigator, are state actors for the purposes of this claim. Plaintiff alleges a number of overt acts committed by both Defendants in furtherance of Plaintiff's prosecution.

According to the complaint, Defendant Smith admitted that Defendant Ogden had been "working on [the] case with [him] for two years," at "every step of the way," and that Defendant Smith considered them "to basically be one entity working together." Dkt. No. 1 ¶ 331. Plaintiff has also attached to his complaint several e-mails between Defendants Smith and Ogden discussing the case and the theories of prosecution. *See* Dkt. No. 1-1 at 21-24.

Plaintiff alleges that Defendant Ogden assisted Defendant Smith in interviewing witnesses, where they asked only pointed questions in an attempt to implicate Plaintiff, but failed to ask questions that would implicate other democratic operatives. *See* Dkt. No. 1 ¶¶ 514, 536-42. Plaintiff alleges that, at Defendant Smith's Direction, Defendant Ogden interviewed Plaintiff at the NYSP station, but did not ask questions about the filing of the AABs that would possibly implicate Defendants McGrath, Brown, Renna, or McInerney. *See id.* ¶¶ 472-73. Likewise, Plaintiff claims that Defendants Smith and Ogden obtained enough evidence to convict certain democratic operatives, including affidavits from voters that clearly implicated Defendant McGrath, but buried that evidence and offered immunity to those democratic operatives. *See id.* ¶¶ 349, 624-26. Plaintiff further alleges that Defendant Ogden agreed with Defendant Smith's decision to not obtain an ink analysis on certain AABs in fear that an ink analysis would exonerate Plaintiff. *See id.* ¶ 902. Moreover, Plaintiff alleges that Defendant Ogden was also aware of Commissioner Bugbee's claim that Defendant McInerney was guilty of the AB forgeries from 2007

and 2008, but Defendants Ogden and Smith ignored this evidence in their investigation of the 2009 forgeries. *See id.* ¶¶ 488-98.

Further, Plaintiff claims that Defendant Ogden completed an affidavit alleging that "the AB forgery was committed in conspiracy by McGrath, Brown, McInerney and others, including [Plaintiff]." *Id.* ¶ 710. This affidavit was the basis for Defendant Smith getting a DNA analysis of the forged AB envelopes. *Id.* Defendant Ogden also allegedly assisted Defendant Smith in orchestrating a "false personnel complaint and/or departmental charges to be made against" senior investigator O'Brien, in order to impede O'Brien's independent investigation into the AB forgeries. *See id.* ¶¶ 1067-69. This complaint was orchestrated after Plaintiff's indictment, and presumably in an attempt to thwart O'Brien's investigation so that Defendant Smith could continue to prosecute Plaintiff. *See id.* ¶¶ 944, 1067-69. Although some of these alleged actions were taken early on in the investigation, Plaintiff sufficiently alleges that Defendants Smith and Ogden prevented other investigators from discovering the actual perpetrators of the AB forgery scheme, which led to Plaintiff's alleged malicious prosecution.

In sum, Plaintiff has sufficiently alleged that Defendant Ogden acted in concert with Defendant Smith to maliciously prosecute Plaintiff. Plaintiff alleges that both Defendants worked closely together and consistently ignored or failed to obtain evidence that incriminated other Defendants in an effort to initiate and continue Plaintiff's prosecution. Thus, Plaintiff has sufficiently stated a Section 1983

conspiracy to commit malicious prosecution claim against Defendant Ogden.

E. County of Rensselaer

Count III of Plaintiff's complaint alleges a Section 1983 *Monell* claim against the County. *See* Dkt. No. 1 ¶¶ 1219-20. Plaintiff alleges that "Defendant County violated the plaintiff's rights and caused him said deprivations through its policymaking acts . . . as alleged herein." *Id.* ¶ 1220. In response, the County argues that Defendants Smith and McNally are not County actors or policymakers. *See* Dkt. No. 95 at 13-20. The County further argues that Plaintiff has not sufficiently alleged facts that establish municipal liability.[5] *See id.* at 11-13.

"Although municipalities are within the ambit of section 1983, municipal liability does not attach for actions undertaken by city employees under a theory of *respondeat superior*." *Birdsall v. City of Hartford*,

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[5] In opposition to the County's motion, Plaintiff submitted a twenty-five page memorandum of law, but also attached a twenty-one page exhibit (Exhibit A) and other documents which are effectively additional memoranda of law. *See* Dkt. No. 115-1. The County argues that this filing violates Local Rule 7.1, which provides that "[n]o party shall file or serve a memorandum of law that exceeds twenty-five (25) pages in length, unless that party obtains leave of the judge hearing the motion prior to filing." N.D.N.Y. Local Rule 7.1. In the Prior Decision, the Court noted that Plaintiff had exceeded the page limit requirements set forth in the Local Rules, and ordered Plaintiff to strictly abide by the page limit requirements henceforth. Plaintiff filed this response with the attached exhibits after the Prior Decision was issued. Since the filing of these exhibits (which are effectively memoranda of law) is in violation of Rule 7.1, the Court will not consider them in deciding the present motion.

249 F. Supp. 2d 163, 173 (D. Conn. 2003) (citing *Monell v. New York City Dep't of Soc. Servs. of New York*, 436 U.S. 658, 691 (1978)). Despite the fact that *respondeat superior* liability does not lie, a municipal entity or employee sued in his or her official capacity can be held accountable for a constitutional violation which has occurred pursuant to "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipality's] officers . . . [or] pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." *Monell*, 436 U.S. at 690-91. Such municipal liability can be established in a case such as this in several different ways, including through proof of an officially adopted rule or a widespread, informal custom demonstrating "a deliberate government policy or failing to train or supervise its officers." *Bruker v. City of New York*, 337 F. Supp. 2d 539, 556 (S.D.N.Y. 2004) (quoting *Anthony v. City of New York*, 339 F.3d 129, 140 (2d Cir. 2003)). A plaintiff may also show that the allegedly unconstitutional action was "taken or caused by an official whose actions represent an official policy," or that municipal officers have acquiesced in or condoned a known policy, custom, or practice. *See Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000), *cert. denied sub nom., County of Schenectady v. Jeffes*, 531 U.S. 813 (2000); *see also Wenger v. Canastota Cent. Sch. Dist.*, No. 5:95-CV-1081, 2004 WL 726007, *3 (N.D.N.Y. Apr. 5, 2004).

When a governmental official is sued in his official capacity, "a governmental entity is liable under Section 1983 only when the entity itself is a moving

force behind the deprivation; thus, in an official-capacity suit the entity's policy or custom must have played a part in the violation of federal law." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (internal citations and quotation marks omitted). A municipal policy may be established by the single act giving rise to a plaintiff's claims if it was "committed by a city official 'responsible for establishing final policy with respect to the subject matter in question,' and . . . represent[ed] a deliberate and considered choice among competing alternatives." *Hall v. Town of Brighton*, No. 13-CV-6155, 2014 WL 340106, *5 (W.D.N.Y. Jan. 30, 2014) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986) (plurality opinion)). When a plaintiff attempts to prove municipal liability "by a city employee's single tortious decision or course of action, the inquiry focuses on whether the actions of the employee in question may be said to represent the conscious choices of the municipality itself." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 126 (2d Cir. 2004) (citing *Pembaur*, 475 U.S. at 481-82). Thus, the single unconstitutional act of an official with "final policymaking authority" can subject a municipality to liability under Section 1983. *Pembaur*, 475 U.S. at 483.

Whether a municipal employee has "'final policymaking authority' is a question of state law" to be decided by the court. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (quoting *St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1998)). Such a determination is made by "[r]eviewing the relevant legal materials, including state and local positive law, as well as "'custom or usage" having the force of

law.'" *Id.* (quoting *Praprotnik*, 485 U.S. at 124 n.1). Importantly, "the official in question need not be a municipal policymaker for all purposes. Rather, with respect to the conduct challenged, he must be 'responsible under state law for making policy *in that area* of the [municipality's] business.'" *Barnes*, 208 F.3d at 57 (quoting *Praprotnik*, 485 U.S. at 123) (other citations omitted). Further, the "official policy" standard "refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembauer*, 475 U.S. at 480-81. Thus, the actions of an officer who does not have explicit policymaking authority may, nonetheless, constitute "official policy" if his decisions are accepted as the binding and ordinary course of conduct by the authorized policymakers. *See Praprotnik*, 485 U.S. at 127 ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final").

Moreover, a county cannot be held liable for the acts of a district attorney related to decisions to prosecute or not prosecute an individual because the district attorney represents the state and not the county. *See Martin v. County of Suffolk*, No. 13-CV-2104, 2014 WL 1232906, *5 (E.D.N.Y. Mar. 26, 2014) (citations omitted); *see also Pinaud v. County of Suffolk*, 52 F.3d 1139, 1154 n.15 (2d Cir. 1995). However, a county can be held liable based upon its "long history of negligent disciplinary practices regarding law enforcement personnel, which gave

rise to the individual defendants' conduct in promoting the malicious prosecution of plaintiffs." *Myers v. Cnty. of Orange*, 157 F.3d 66, 77 (2d Cir. 1998) (quotation omitted).

In the present matter, Plaintiff has failed to allege facts that establish municipal liability. Many of Defendant Smith's actions were related to his decision whether to prosecute certain individuals, and a county cannot be held liable for those decisions. *See Martin*, 2014 WL 1232906, at *5. Moreover, Plaintiff merely makes conclusory allegations that Defendants Smith and McNally acted as policymakers for the County. Plaintiff alleges that Defendant Smith's actions "constituted an unlawful policy decision" and that Defendants Smith and McNally are "policy-making officials," but Plaintiff provides no specific allegations that Defendants Smith or McNally are responsible for making policy for the County. *See* Dkt. No. 1 ¶¶ 1185, 1194. Likewise, Plaintiff has not alleged that the County has a long history of negligent practices that gave rise to Plaintiff's prosecution or that Defendant Smith's actions were the binding and ordinary course of conduct of the County. The Court also notes that Defendant Smith was appointed as special prosecutor for the limited purpose of investigating and prosecuting the AB forgery case, and there are no allegations that Defendant Smith acted in a more substantial role with respect to the County. Accordingly, the County's motion to dismiss is granted in its entirety, and the County is dismissed as a Defendant in this action.

F. Motions for Sanctions

Defendants John and Daniel Brown moved for sanctions against Plaintiff and his attorney pursuant to Federal Rule of Civil Procedure 11, *see* Dkt. No. 89, and Plaintiff cross-moved for sanctions against the Brown Defendants and their attorney, *see* Dkt. No. 90.

The central objective behind Rule 11 is the deterrence of "baseless filings in district courts." *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). "Drawing a line between zealous advocacy and frivolous conduct, Rule 11 provides a vehicle for sanctioning an attorney, a client, or both." *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 948 F.2d 1338, 1343 (2d Cir. 1991). Specifically, Rule 11 provides as follows:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have

> evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b). "[T]he standard for triggering the award of fees under Rule 11 is objective unreasonableness." *Margo v. Weiss*, 213 F.3d 55, 65 (2d Cir. 2000) (citing *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1469-70 (2d Cir. 1988)).

In analyzing a motion for sanctions pursuant to Rule 11, the district court is required to "avoid hindsight and resolve all doubts in favor of the signer." *See Carrasquillo v. City of Troy*, No. 1:02–CV–01231, 2006 WL 304031, *4 (N.D.N.Y. Feb. 8, 2006) (citing *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986)). The imposition of sanctions upon a party is a discretionary decision for the district court, and must be exercised with caution. *See Cerrone v. Cahill*, No. 95-CV-241, 2001 WL 1217186, *16 (N.D.N.Y. Sept. 28, 2001) (citing *Knipe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994)). Accordingly, Rule 11 is violated only when "it is patently clear that a claim has absolutely no chance of success." *Carrasquillo*, 2006 WL 304031, at *4 (internal citations omitted).

There are certain procedural rules a party must follow when making a motion for sanctions. "[A] party moving for Rule 11 sanctions must do so in a filing 'made separately from any other motion.'" *Lawrence v. Richman Grp. of CT LLC*, 620 F.3d 153, 156 (2d Cir. 2010); *see also* Fed. R. Civ. P. 11(c)(2).

"Rule 11's safe harbor provision provides an opportunity to withdraw or correct a challenged submission by requiring initial service of the motion, but delays filing or presentation of the motion to the court for 21 days; filing of the motion is permitted 21 days after service only if the challenged submission is not 'withdrawn or appropriately corrected.'" *In Re Pennie & Edmonds LLP*, 323 F.3d 86, 89 (2d Cir. 2003) (quotation omitted). The purpose of the safe harbor provision is to "permit sanctions to be imposed on a party who has violated Rule 11(b) only after that party is provided with notice of the pleading defect and afforded an opportunity to correct or withdraw the defective filing." *Lawrence*, 620 F.3d at 159.

Defendants John and Daniel Brown argue that sanctions against Plaintiff are appropriate because Plaintiff failed to realize that both Brown Defendants have absolute immunity from suit for testifying and for their meetings with the prosecutor before testifying. *See* Dkt. No. 89-1 at 6. As such, they claim that Plaintiff's complaint is frivolous. *See id.* at 10. They further argue that Plaintiff filed his complaint for the improper purpose of harassing Defendants and increasing their litigation costs. *See id.*

The Court finds that sanctions against Plaintiff and his counsel are inappropriate in this case. Although the Court did ultimately dismiss Plaintiff's claims against Defendants John and Daniel Brown in the Prior Decision, it cannot be said that Plaintiff's claims against them were frivolous. *See* Dkt. No. 114 at 39-43. As the Court noted in the Prior Decision, Plaintiff alleged that John Brown

gave a sworn, written deposition wherein he fabricated incidents that occurred in Plaintiff's office and implicated Plaintiff in the forgery scheme. *See* Dkt. No. 1 ¶¶ 1057-58. The complaint also contains allegations that Defendant Smith met with John Brown before he issued this statement to ensure that it was consistent with the other Defendants' sworn testimony. *Id.* ¶ 1061. The Court concluded that, although this statement did not receive absolute immunity, Plaintiff had not sufficiently alleged that John Brown had an agreement with Defendant Smith to maliciously prosecute Plaintiff. *See* Dkt. No. 114 at 41. The Court found that Plaintiff's allegations against John Brown were conclusory and that John Brown's alleged link to the malicious prosecution was more tenuous than certain other Defendants. Even though Plaintiff did not sufficiently state a cause of action against John Brown, his claims were not frivolous. Plaintiff sufficiently alleged that John Brown was not entitled to absolute immunity for his written statement, and Plaintiff also alleged, albeit in a conclusory fashion, that John Brown played a role in Plaintiff's malicious prosecution. As such, sanctions are not appropriate for Plaintiff's claims against John Brown.

Plaintiff alleges that Defendant Daniel Brown likely possessed and filed certain forged AABs, and then gave false testimony about them before a grand jury. *See* Dkt. No. 1 ¶¶ 1131-34. Plaintiff argued that Daniel Brown was not entitled to absolute immunity because he was a "complaining witness." *See* Dkt. No. 60 at 63-64. In the Prior Decision, the Court found that Daniel Brown was not a "complaining witness" because he was not involved

in the investigation until after Plaintiff had been indicted, and, therefore, he is entitled to absolute immunity for his testimony. *See* Dkt. No. 114 at 42. As such, the Court dismissed Plaintiff's claims against Daniel Brown. In resolving all doubts in Plaintiff's favor, the Court finds that Plaintiff's claims against Daniel Brown were not frivolous. Considering Plaintiff's numerous allegations that various Defendants conspired to present false testimony that would implicate Plaintiff, coupled with Plaintiff's claim that Daniel Brown likely filed forged AABs and then falsely testified about them, the Court finds that Plaintiff's claims against Daniel Brown were not frivolous. To be sure, Plaintiff has not sufficiently alleged that Daniel Brown was involved in the alleged conspiracy to scapegoat prosecute Plaintiff. However, in resolving all doubts in favor of Plaintiff and in light of Plaintiff's allegations that Daniel Brown was working with several Defendants who were involved in the alleged malicious prosecution of Plaintiff, although it may be a close call, it cannot be said that Plaintiff's claims against Daniel Brown were frivolous. However, even if Plaintiff's claims against Daniel Brown can be considered frivolous, in its discretion, the Court declines to impose sanctions on Plaintiff or his attorney.

Plaintiff also cross-moved for sanctions against Defendants John and Daniel Brown, arguing that their motion for sanctions is frivolous and presented only to harass Plaintiff. *See* Dkt. No. 90 at 10. At the outset, there is no indication that their motion was presented to harass Plaintiff or increase Plaintiff's litigation costs. Moreover, in resolving all

doubts in the Brown Defendants' favor, their motion for sanctions is not frivolous. In their motion, the Brown Defendants argue that Plaintiff's claims against them were frivolous. The Court dismissed Plaintiff's claims against both Brown Defendants in the Prior Decision. With respect to Daniel Brown, since his testimony is entitled to absolute immunity and Plaintiff did not sufficiently allege that he acted in conspiracy with the other Defendants, Plaintiff's claims against him, although not frivolous, were well short of the pleading requirements. As such, it was not unreasonable for Daniel Brown to argue that Plaintiff's claims against him were frivolous, especially since Daniel Brown's testimony was shielded by absolute immunity. With respect to John Brown, his testimony was also entitled to absolute immunity, and although he issued a written statement that is not shielded by immunity, Plaintiff failed to sufficiently allege that he was involved in the conspiracy to maliciously prosecute Plaintiff. Again, although the Court finds that Plaintiff's claims against John Brown were not frivolous, it was not objectively unreasonable for John Brown to argue that Plaintiff's claims against him were frivolous. As such, the Court will not impose sanctions on Defendants John and Daniel Brown or their attorney.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions, and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant Smith's motion to dismiss (Dkt. No. 96) is **GRANTED** in its entirety; and the Court further

ORDERS that Defendant Ogden's motion to dismiss (Dkt. No. 73) is **GRANTED** in part and **DENIED** in part as stated herein;[6] and the Court further

ORDERS that Defendant County of Rensselaer's motion to dismiss (Dkt. No. 97) is **GRANTED** in its entirety; and the Court further

ORDERS that Defendants Smith and the County of Rensselaer are terminated from this action; and the Court further

ORDERS that Defendants John and Daniel Brown's motion for sanctions (Dkt. No. 89) is **DENIED**; and the Court further

ORDERS that Plaintiff's cross-motion for sanctions (Dkt. No. 90) is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: December 30, 2016.

Albany, New York

---

[6] Plaintiff's Section 1983 conspiracy to commit malicious prosecution claim against Defendant Ogden survives the instant motion. All other claims against Defendant Ogden are dismissed.

Mae A. D'Agostino

Mae A. D'Agostino
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 17-296

EDWARD G. MCDONOUGH,

Plaintiff-Appellant,

v.

Youel Smith, individually and as Special District Attorney for the County of Rensselaer, New York, AKA Trey Smith,

Defendant-Appellees,

John J. Ogden, Richard McNally Jr., Kevin McGrath, Alan Robillard, County of Rensselaer, John F. Brown, William A. McInerney, Kevin F. O'Malley, Daniel B. Brown, Anthony J. Renna,

Defendants.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of September, two thousand eighteen.

ORDER

Appellant, Edward G. McDonough, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the

appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

No. 18-485

In The
Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, Individually and as Special District Attorney for the County of Rensselaer, New York, aka TREY SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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ARGUMENT

POINT I

THE SECOND CIRCUIT'S ANALYTICAL FRAMEWORK TO DETERMINE THE ACCRUAL OF PLAINTIFF'S DUE PROCESS FABRICATION OF EVIDENCE CLAIM WAS PROPER

The Petition for Certiorari asserts that the Second Circuit, in its August 3, 2018 Decision, failed to identify the right at issue, then compare that right to the most analogous tort at common law. (Pet. 23-24; 26). This is not the case. The Circuit Court pointedly identified the right, arising from the Fifth and Fourteenth Amendments' Due Process Clauses, "not to be deprived of liberty as a result of the fabrication of evidence by a government officer. . . ." (Pet. App. 10a). The Circuit Court also concluded that this due process claim "is different from a malicious prosecution claim." *Id.* at 8a, explaining:

> Because the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the cause of action accrues. **Indeed, the harm – and the due process violation – is in the use of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding.** (Emphasis supplied).

> We thus conclude that under the circumstances here, the §1983 action based on fabrication of evidence occurred when McDonough (1) learned of the fabrication of the evidence and its use against him in criminal proceedings, and (2) was deprived of a liberty interest by his arrest and trial. For McDonough, this was, at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial, after all of the prosecutor's evidence had been presented. **"[J]udicial verification that the defendants' acts were wrongful" is not required, and thus accrual did not have to await McDonough's acquittal.** (Emphasis supplied).
>
> In contrast, we have long held that malicious prosecution claims brought pursuant to §1983 do not accrue until the underlying criminal proceedings against the plaintiff terminate in his favor. *Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir. 2010). **Favorable termination is an element of malicious prosecution under New York law and also for the Constitutional-based tort. *Id.* A plaintiff therefore cannot have a complete cause of action unless and until the criminal proceedings against him terminate favorably.** (Emphasis supplied).

Under the traditional federal rule of accrual, "the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not

then known or predictable." *Wallace v. Kato*, 549 U.S. 384, 391 (2007). See also *Clark v. Iowa City*, 87 U.S. 583, 859 (1897); *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *Bay Area Laundry and Dry-Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192, 201 (1997); *Singleton v. City of N.Y.*, 632 F.2d 185, 191 (2 Cir. 1980); *Veal v. Geraci*, 23 F.3d 722, 724-725 (2 Cir. 1994).

Thus, the Second Circuit properly concluded, in accordance with the traditional federal accrual rule, that the plaintiff's due process fabrication of evidence claim was not analogous to a §1983 malicious prosecution claim since "absence of probable cause" and "favorable determination," integral to the §1983 malicious prosecution claim, are not prerequisites to a due process fabrication of evidence claim. See *Garnett v. Undercover Officer C39*, 838 F.3d 265, 278-280 (2 Cir. 2016); *Ricciuti v. N.Y. City Trans. Auth.*, 124 F.3d 123, 130-131 (2 Cir. 1997); and *Rentas v. Ruffin*, 816 F.3d 214, 224-225 (2 Cir. 2016). The two are discrete claims and accrue at different times. *Id*.

POINT II

THE SECOND CIRCUIT'S ACCRUAL RULE WILL NOT PREJUDICE A CRIMINAL DEFENDANT

The petitioner expresses concern that the application of the traditional federal rule of accrual to discrete §1983 claims will burden and potentially prejudice the criminal defendant and create a potential for conflicting civil and criminal judgments. (Pet. 5-6). We submit

petitioner's concern is overstated. This issue has been uniformly addressed by the Supreme Court and the Second Circuit.

In *Wallace v. Kato*, 549 U.S. 384 (2007), the Supreme Court affirmed the Seventh Circuit's holding that where an arrest is followed by criminal proceedings, a §1983 claim for false arrest accrues when the claimant becomes detained pursuant to legal process. *Id.* at 389-390. The petitioner in *Wallace* contended that, under *Heck v. Humphrey*, 512 U.S. 477 (1994), his claim did not accrue until the state dropped the charges against him. *Id.* at 392. This Court rejected this argument, stating:

> What petitioner seeks . . . is an adoption of a principle that goes well beyond *Heck*: that an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside. The impracticality of such a rule should be obvious.

Id. at 393.

The Court also addressed the petitioner's concern for prejudice and/or conflicting civil and criminal judgments:

> If a plaintiff files a false-arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil

> action until the criminal case or the likelihood of a criminal case has ended.

Id. at 393-394.

Significantly, the Second Circuit adopted this approach prior to *Wallace*. See *Singleton v. City of N.Y.*, 632 F.2d 185, 193 (2 Cir. 1980) and *Mack v. Varelas*, 835 F.2d 995, 999-1000 (2 Cir. 1987); see also *Smith v. Campbell*, 782 F.3d 393, 394-396 (2 Cir. 2015). There is, in short, no evidence of any untoward effects from the prudential approach to this issue.

POINT III

PLAINTIFF'S §1983 DUE PROCESS CLAIM IS NOT A CONTINUING TORT

The Second Circuit rejected petitioner's argument that his prosecution constituted a "continuing violation." (Pet. App. 16a-17a). Petitioner contends this was error, citing Justice Ginsberg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266, 280 (1994); and the Seventh Circuit's decision in *Manuel v. City of Joliet*, 903 F.3d 667, 669 (7 Cir. 2018) (Pet. 22). We respectfully submit that the Second Circuit's determination of this issue is correct and conforms with this Court's jurisprudence. As the Court observed, through Justice Scalia, in *Wallace v. Kato*, 549 U.S. 384, 391 (2007):

> Under the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitation commences to run, when the wrongful act or omission results in damages. **The cause of action accrues even though**

> **the full extent of the injury is not then known or predictable")** (Interior quotes and citations omitted) (Emphasis supplied).

In *Manuel v. City of Joliet*, 137 S.Ct. 911, 923 (2017), Justice Alito, joined by Justice Thomas in dissent, also addressed this issue:

> The protection provided by the Fourth Amendment continues to apply after "the start of legal process" . . . if legal process is understood to mean the issuance of the arrest warrant or what is called a "first appearance" under Illinois law and an "initial appearance" under federal law . . . **But if the Court means more – specifically that new Fourth Amendment claims continue to accrue as long as pretrial detention lasts – the Court stretches the concept of a seizure much too far.** (Emphasis supplied).

The Second Circuit's treatment of this issue is in accord with these observations by Justices Scalia and Alito in *Wallace* and *Manuel*; *Singleton v. City of N.Y.*, 632 F.2d 185, 191-192 (2 Cir. 1980) ("Nothing prevented Singleton from bringing suit during the period when the criminal prosecution against him was pending.").

POINT IV

THE SECOND CIRCUIT APPLIES THE TRADITIONAL ACCRUAL RULE WITH RESPECT TO §1983 "*BRADY*" CLAIMS

With respect to §1983 "*Brady* claims," the petitioner comments:

> Although the courts of appeals are divided over the precise statute of limitations rule to apply in Brady cases, *none* of those courts has held that the statute of limitations begins to run as soon as the criminal defendant discovers that exculpatory evidence has been withheld.

Pet. 21.

Nor does the Second Circuit. It is the rule in the Second Circuit that a §1983 claim based upon a *Brady* violation, by the prosecutor's failure to disclose exculpatory or impeaching evidence, does not mature *unless* there is a conviction. *Poventud v. City of N.Y.*, 750 F.3d 121, 132-134, 156 n.4 (2 Cir. 2014); *Amaker v. Weiner*, 179 F.3d 48, 51-52 (2 Cir. 1999). In other words, if the underlying criminal prosecution has terminated in a criminal defendant's favor, a §1983 *Brady* claim will not have matured because an essential element of the §1983 claim, a conviction, is missing. *Id.*

POINT V

PETITIONER'S §1983 DUE PROCESS FABRICATION OF EVIDENCE CLAIM WAS SUBSUMED IN HIS §1983 MALICIOUS PROSECUTION CLAIM WHICH WAS DISMISSED BY THE DISTRICT COURT FROM WHICH NO APPEAL WAS TAKEN

It is petitioner's position that a §1983 due process fabrication of evidence claim takes two discrete forms, with differing accrual rules: one where there is untainted evidence establishing probable cause; another, where the fabricated evidence forms the basis for probable cause. Petitioner has acknowledged that the former is subject to the traditional federal accrual rule, maturing when a criminal defendant learns the evidence was fabricated and that evidence causes some injury; and the latter, accruing only upon a favorable termination of the underlying criminal proceeding. Petitioner has pointedly alleged in this litigation that his §1983 due process fabrication of evidence claim "is a quintessential malicious prosecution claim based on false evidence, i.e., one without probable cause for nefarious purpose." Consequently, the due process claim is merely a duplication of his §1983 malicious prosecution claim.

However, petitioner's §1983 malicious prosecution claim was dismissed by the district court (Pet. App. 109a-114a) and no appeal was taken by petitioner from that determination. Accordingly, the issue of the accrual of petitioner's §1983 due process fabrication of evidence claim, cast congruently in the form of a

"quintessential malicious prosecution claim," was subsumed in plaintiff's §1983 malicious prosecution claim and effectively abandoned when petitioner failed to appeal the dismissal of that claim to the circuit court. *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Rehnquist, C.J.) (plurality opinion); 280 (Ginsberg, J.) (concurring opinion).

In *Albright*, an arrest warrant was issued charging Albright with sale of a substance that "looked like" an illegal drug. Albright surrendered himself to Officer Oliver and was released after posting bond. At a preliminary hearing, Officer Oliver testified Albright sold a look-alike substance to a third party. The court found probable cause to hold Albright for trial but later dismissed the prosecution on the ground that the charge did not state a crime.

Albright filed a §1983 action alleging that Oliver deprived him of substantive due process under the Fourteenth Amendment to be free from criminal prosecution except upon probable cause. District Court granted Oliver's motion for dismissal on the ground that the complaint did not state a claim.

The Seventh Circuit affirmed relying on *Paul v. Davis*, 424 U.S. 693 (1976) holding that a prosecution without probable cause is actionable only if accompanied by incarceration, loss of employment or some other "palpable consequences." *Albright v. Oliver*, 975 F.2d 343, 346-347 (7 Cir. 1992) (" . . . state tort remedies should be adequate and the heavy weaponry of constitutional litigation can be left at rest."). The Supreme Court affirmed on different grounds, stating:

> We hold that it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claim must be judged.

Id. at 271.

* * *

> Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." (Citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)).
>
> We think this principle is likewise applicable here. The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.

Id. at 273-274.

* * *

> We have in the past noted the Fourth Amendment's relevance to the deprivation of liberty that go hand in hand with criminal prosecutions. See *Gerstein v. Pugh*, 420 U.S. 103 . . . (1975) (holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to any extended restraint on liberty following an arrest.

Id. at 274.

Justice Ginsberg, in a concurring opinion, agreed with the plurality opinion that Albright's claim "is properly analyzed under the Fourth Amendment rather than under the heading of substantive due process." *Id.* at 276.

Justice Souter, in a separate concurring opinion, also agreed that Albright "has not justified recognition of a substantive due process violation in his prosecution without probable cause," *id.* at 296, stating further:

> Justice Harlan [in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion)] could not infer that the due process guarantee was meant to protect against insubstantial burdens, and **we are not free to infer that it was meant to be applied without thereby adding a substantial increment to protection otherwise available. The importance of recognizing the latter limitation is underscored by pragmatic concerns about subjecting government actors to two (potentially inconsistent) standards for the same conduct and needlessly imposing on trial courts the unenviable burden of reconciling well-established jurisprudence under the Fourth and Eighth Amendments** with the ill-defined contours of some novel due process right. (Emphasis supplied).
>
> This rule of reserving due process for otherwise homeless substantial claims no doubt informs those decisions, see *Graham v. Connor*, 490 U.S. 386 (1989); *Gerstein v. Pugh*, 420 U.S.

> 103 (1975); and *Whitley v. Albers*, 475 U.S. 312, 327 (1986), in which **the Court has resisted relying on the Due Process Clause when doing so would have duplicated protection that a more specific constitutional provision already bestowed.** This case calls for just such restraint, in presenting no substantial burden on liberty beyond what the Fourth Amendment is generally thought to redress already. (Emphasis supplied).

Id. at 287-288.

This rationale of the Court fortifies our contention that, based on petitioner's allegations, the §1983 claim asserted is a Fourth Amendment malicious prosecution claim whose dismissal has not been appealed and the sufficiency of which, including its accrual, is not before the Court.

CONCLUSION

For all of the above reasons, separately and together, this case is not an appropriate vehicle for reviewing the question presented. The Petition for a Writ of Certiorari should be denied.

DATED: December 7, 2018

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No. 18-485

IN THE
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EDWARD G. MCDONOUGH,
Petitioner,

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

Smith's brief in opposition does not try to challenge the core contention of McDonough's petition: There is a clear, acknowledged split among the courts of appeals on a question of immense practical consequence for criminal defendants, public officials, and courts. *See* Amicus Br. of Criminal Defense Organizations et al. 15-21. Because the Second Circuit diverged below from the sensible rule adopted by multiple other courts of appeals, this case presents an ideal opportunity to resolve the important ques-

tion of when the statute of limitations begins to run for a Section 1983 claim based on fabrication of evidence. The Court should grant the petition and reverse.

ARGUMENT

I. SMITH DOES NOT CONTEST THAT THERE IS A CLEAR SPLIT.

Smith does not contest that there is a clear, acknowledged division of authority among the courts of appeals with respect to when the statute of limitations begins to run for a Section 1983 claim based on fabrication of evidence. The Second Circuit held below that the limitations period starts when the criminal defendant "becomes aware of th[e] tainted evidence and its improper use." Pet. App. 13a.[1] As the Second Circuit itself "acknowledge[d]," multiple other circuit courts disagree. *Id.* at 12a. The Third, Fifth, Sixth, Ninth, and Tenth Circuits have all held that the statute of limitations begins to run only once criminal proceedings terminate in the defendant's favor. *See Floyd* v. *Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018) (per curiam); *Castellano* v. *Fragozo*, 352 F.3d 939, 959-960 (5th Cir. 2003) (en banc); *Mills* v. *Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (citing *King* v. *Harwood*, 852 F.3d 568, 579 (6th Cir. 2017)); *Bradford* v. *Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015); *Mondragón* v. *Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008). This

---

[1] Smith acknowledges that the Second Circuit has adopted a different rule in the analogous *Brady* context, where an official *withholds* exculpatory evidence. *See* Opp. 7.

acknowledged split is reason enough to grant the petition.

Smith similarly does not dispute that the Second Circuit split with the Seventh Circuit on the separate issue of whether the statute of limitations begins to run afresh each day a defendant's constitutional rights are violated. On remand in *Manuel* v. *City of Joliet*, the Seventh Circuit held that where a criminal defendant is detained based on fabricated evidence, the "wrong of detention without probable cause continues for the duration of the detention," and the criminal defendant's Section 1983 claim therefore "accrues when the detention ends." 903 F.3d 667, 670 (7th Cir. 2018) ("*Manuel II*"). In stark contrast, the Second Circuit here rejected McDonough's argument that the use of fabricated evidence in his case was a "continuing violation, that only ceased on his acquittal," and held instead that the statute of limitations on McDonough's claim began to run when he first "became aware of the fabricated evidence." Pet. App. 16a-17a (internal quotation marks omitted). This division in authority similarly warrants the Court's attention.

Smith's silence on *both* circuit splits speaks volumes. Without this Court's intervention, all parties agree that nothing more than geography will determine when the statute of limitations begins to run on a Section 1983 claim based on fabrication of evidence. The Court should grant certiorari and resolve the split.

II. THE SECOND CIRCUIT'S DECISION WAS WRONGLY DECIDED.

The brief in opposition ignores the circuit splits created by the decision below, and instead simply

asserts that the Second Circuit's decision was correct. *See* Opp. 1-3. But it is plain that the Second Circuit ignored the analytical approach set forth by this Court in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and *Wallace* v. *Kato*, 549 U.S. 384 (2007), and departed from the majority rule adopted by multiple other courts of appeals. Nothing in Smith's brief saves the Second Circuit's flawed opinion.

In *Heck* and *Wallace*, this Court outlined the procedure for determining when the statute of limitations begins to run in a Section 1983 case: first, identify the right at issue; second, compare that right to the most analogous tort at common law; and third, apply the statute of limitations rule governing that analogous tort to the Section 1983 claim. *See Heck*, 512 U.S. at 483-487; *Wallace*, 549 U.S. at 388-390. The Second Circuit did not do that here. Indeed, despite quoting at length from the Second Circuit's opinion, Smith does not cite any part of that opinion analyzing the most analogous tort at common law, much less applying that tort's statute of limitations rule to McDonough's Section 1983 claim. *See* Opp. at 1-3.

If the Second Circuit had performed this analysis, it would have reached a different result. As the Court explained in *Wallace*, where a Section 1983 claim seeks damages for the violation of a constitutional right *after* the institution of legal process, the analogous common law tort is malicious prosecution. *See* 549 U.S. at 390. That is because the tort of malicious prosecution remedies the "wrongful institution of legal process" and the "wrongful use of judicial process." *Id.* (internal quotation marks and emphasis omitted); *see* Amicus Br. of Criminal Jus-

tice Institute of Harvard Law School 17 (explaining that the tort of malicious prosecution "center[s] around the misconduct of state officials * * * to attain a criminal conviction" and "offer[s] a recourse for individuals who have been targeted as defendants in unjust trials"). Importantly, the statute of limitations for the tort of malicious prosecution does not begin to run until "termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. Because McDonough sought damages for the deprivation of his constitutional rights *after* legal process was instituted, Pet. 25-26, the statute of limitations began to run when criminal proceedings terminated in McDonough's favor.

Smith asserts that the "traditional federal rule of accrual" governs fabrication of evidence claims, and that the statute of limitations accordingly began to run "when the wrongful act or omission result[ed] in damages." Opp. 2 (internal quotation marks omitted). But this Court did not apply that rule in either *Heck* or *Wallace*. In *Wallace*, for example, the Court did not start the limitations clock at the time the criminal defendant was falsely arrested—and presumably began to suffer damages—but instead at the time the false arrest *ended*. *See* 549 U.S. at 389-390 & n.3. Smith similarly fails to account for the *six* courts of appeals that have departed from what he calls the "traditional" rule. *See supra* at 2-3. And in any event, even if the "traditional" rule applies here, McDonough's lawsuit is timely because the wrongful acts at issue—the use of fabricated evidence—continued throughout both of McDonough's trials. *See Manuel II*, 903 F.3d at 670; Amicus Br. of Cause of Action Institute 7 ("Fabricated evidence is not * * * an object discarded after initial use.").

Smith also asserts that the Second Circuit's approach is consistent with Justice Alito's dissent in *Manuel* v. *City of Joliet*, 137 S. Ct. 911 (2017) ("*Manuel I*"). *See* Opp. at 6. In *Manuel I*, Justice Alito expressed concern that the Fourth Amendment's concept of a "seizure" had been stretched too far in the *pre-trial detention* context. *See* 137 S. Ct. at 923, 927 (Alito, J., dissenting). Here, McDonough alleges that his constitutional rights were violated throughout two *jury trials*. *See* Pet. 25-26. McDonough's Section 1983 claim, moreover, is not limited to the Fourth Amendment, but also seeks relief under the Due Process Clause of the Fifth and Fourteenth Amendments—which Justice Alito suggested may be the proper "home" for the claim at issue in *Manuel I*. 137 S. Ct. at 923.

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT QUESTION.

McDonough's case presents a clean vehicle to resolve the question presented. McDonough raised and preserved his Section 1983 claim based on fabrication of evidence before both the district court and the Second Circuit. Pet. App. 6a-8a, 47a-49a, 94a-95a. And each court directly addressed whether that claim was timely. *Id.* at 19a, 52a-53a, 94a. The question of when the statute of limitations begins to run on McDonough's claim is squarely before this Court and critical to the disposition of McDonough's case. The Court should grant certiorari to resolve this important question.

1. Smith asserts that McDonough's fabrication of evidence claim was somehow "subsumed" by his separate malicious prosecution claim. Opp. 8-9. That assertion is meritless. McDonough pressed

independent Section 1983 claims based on fabrication of evidence and malicious prosecution below, *see* Compl. ¶¶ 1209-1220, No. 1:15-CV-1505 (MAD/DJS), 2015 WL 9435166 (N.D.N.Y. Dec. 18, 2015), and the District Court analyzed them as separate causes of action, *see, e.g.*, Pet. App. 46a ("Plaintiff's three causes of action are well pled and succinctly stated * * *."); *id.* at 47a ("Plaintiff asserts a malicious prosecution and a fabrication of evidence claim against each of the Defendants."). The Second Circuit followed suit, dismissing McDonough's fabrication of evidence claim as untimely, Pet. App. 8a-9a, and McDonough's malicious prosecution claim as barred by absolute immunity, Pet. App. 17a-19a. McDonough has consistently argued—based on this Court's decisions in *Heck* and *Wallace*—that his fabrication of evidence claim is *analogous* to the tort of malicious prosecution, not that it is the same claim. *See* Pet. App. 6a.[2]

Smith appears to acknowledge this point. On the very first page of the brief in opposition, Smith quotes the Second Circuit's conclusion that McDonough's fabrication of evidence claim "is different from a malicious prosecution claim." Opp. 1 (quoting Pet. App. 8a). On the next page, he includes a lengthy excerpt of the opinion, which explains that fabrication of evidence and malicious prosecution are independent claims. Opp. 2. And on the page after

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[2] Smith asserts that McDonough did not appeal the dismissal of his malicious prosecution claim to the Second Circuit. *See* Opp. 8. That is plainly wrong. *See* Pet. App. 17a-19a & n.15 (discussing and then affirming dismissal of McDonough's malicious prosecution claim).

that, Smith explicitly states that fabrication of evidence and malicious prosecution "are discrete claims." Opp. 3. This makes perfect sense: A prosecutor may maliciously target an individual for prosecution without fabricating evidence, and a prosecutor may fabricate evidence even where there is cause to prosecute. *See Spencer* v. *Peters*, 857 F.3d 789, 801 (9th Cir. 2017); Restatement (Second) of Torts § 653 (1977); Amicus Br. of Criminal Defense Organizations et al. 20.

Smith cites (at 9-12) this Court's plurality opinion in *Albright* v. *Oliver*, 510 U.S. 266 (1994) (Rehnquist, C.J.), which held that "pretrial deprivations of liberty" were protected by the Fourth Amendment rather than "the concept of substantive due process." *Id.* at 271-275 (internal quotation marks omitted). That holding is irrelevant here. McDonough does not seek damages for unlawful arrest or detention prior to the institution of legal process. *See* Pet. 25. Nor did McDonough limit his Section 1983 suit to a single constitutional theory; as McDonough noted in his petition—and Smith does not contest—McDonough brought his Section 1983 claim based on fabrication of evidence under the Fourth, Fifth, Sixth, and Fourteenth Amendments. *See* Pet. 10 & n.2.

In any event, Smith's argument on this issue is forfeited. He did not argue below that McDonough's malicious prosecution and fabrication of evidence claims were one and the same, and he cannot do so for the first time before this Court. Nor did he file a cross-petition challenging the Second Circuit's established precedent on this issue, which holds that a criminal defendant may pursue "independent" Section 1983 claims based on malicious prosecution and

fabrication of evidence. *See, e.g.*, *Garnett* v. *Undercover Officer C0039*, 838 F.3d 265, 278 (2d Cir. 2016). Smith's argument on this issue is meritless, forfeited, and contradicted by his own brief.

2. Smith asserts that any policy concerns raised by this case were addressed by *Wallace*. *See* Opp. 4-5. That is incorrect. *Wallace* involved a claim for false arrest, which typically occurs prior to—and independent from—the wrongful institution and continuation of legal process. *See* 549 U.S. at 389-90; *see also* Amicus Br. of Criminal Justice Institute of Harvard Law School 20 (citing *Fifield* v. *Barrancotta*, 353 F. App'x 479, 481 (2d Cir. 2009)). Here, McDonough claims that Smith used fabricated evidence *throughout* the criminal proceedings against him, including two jury trials. This case accordingly raises different policy issues than those discussed in *Wallace*.

The importance of this case, moreover, is clear. "[D]eception of court and jury" offends the Constitution's "fundamental conceptions of justice." *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (per curiam). Yet fabrication of evidence in criminal proceedings remains a "serious, systemic problem." Amicus Br. of Criminal Defense Organizations et al. 15; Amicus Br. of Cause of Action Institute 4-6.[3] The Second Cir-

[3] Such claims are common throughout the courts of appeals. *See, e.g.*, *Garnett* v. *Undercover Officer C0039*, 838 F.3d 265, 279 (2d Cir. 2016); *Black* v. *Montgomery Cty.*, 835 F.3d 358, 370 (3d Cir. 2016); *Webb* v. *United States*, 789 F.3d 647, 667-670 (6th Cir. 2015); *Avery* v. *City of Milwaukee*, 847 F.3d 433, 441-443 (7th Cir. 2017); *Riddle* v. *Riepe*, 866 F.3d 943, 947-948 (8th Cir. 2017); *Caldwell* v. *City & Cty. of San Francisco*, 889 F.3d 1105, 1108-09 (9th Cir. 2018).

cuit's rule will make litigating these claims costlier and more unpredictable for courts, criminal defendants, and public officials, warranting this Court's intervention.

In the Second Circuit, to determine when the statute of limitations begins to run for a Section 1983 claim based on fabrication of evidence, courts will be required to determine when a criminal defendant *knew or should have known* that each piece of inaccurate evidence was actually falsified—a difficult and costly task, especially as witnesses "change or recant their stories" or physical evidence is later "reexamined in a wider context." Amicus Br. of Cause of Action Institute 11; Amicus Br. of Criminal Justice Institute of Harvard 8-9. And in many cases, it will require criminal defendants to file a civil suit *before* the wrongful conduct has ceased. *See* Pet. 33.

Nor will the Second Circuit's rule benefit public officials. "At a minimum," officials will have to respond to a criminal defendant's initial filing, and may have to sit for depositions and answer discovery, while parallel criminal proceedings are still underway. Amicus Br. of Cause of Action Institute 9; *see* Amicus Br. of Criminal Justice Institute of Harvard Law School 13. Criminal defendants, too, may have to answer questions in a deposition regarding what they know about evidence being used against them at trial—a procedure completely "at odds with the structure and goals of the criminal justice system." Amicus Br. of Criminal Defense Organizations 12. Although Smith assumes that many civil proceedings will be stayed, Opp. 4-5, the Second Circuit has imposed no such requirement. In some courts, civil claims may proceed in parallel with criminal pro-

ceedings involving the very same evidence—precisely what this Court cautioned against in *Heck*. Pet. 34.

Unless this Court intervenes, the Second Circuit's divergent rule will impose unnecessary costs on courts, create uncertainty for public officials, and erect new hurdles for criminal defendants seeking to vindicate fundamental constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

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BRIEF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor (as the majority of circuits has held) or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use (as the Second Circuit held below).

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BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CoA Institute") respectfully submits this *amicus curiae* brief in support of petitioner.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae CoA Institute is a 501(c)(3) nonpartisan, nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.[2] CoA Institute uses various investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, representing third-party plaintiffs in actions against the federal government and appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA Institute has a particular interest in challenging government overreach in the criminal justice

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *See* Cause of Action Inst., *About*, www.causeofaction.org/about (last visited Nov. 12, 2018).

system and ensuring government accountability in maintaining the rule of law. In order to fulfill this mission, CoA Institute has represented criminal defendants in federal court, *e.g.*, *United States v. Black*, No. CR 12-0002 (N.D. Cal.), appeared as *amicus curiae* in *Yates v. United States*, 135 S. Ct. 1074 (2015), and appeared as *amicus curiae* in other criminal matters before this court. *See, e.g.*, *DeCoster v. United States*, No. 16-877 (2017), *Overton v. United States*, No. 15-1504 (2017), and *Marinello v. United States*, No. 16-1144 (2017).

SUMMARY OF ARGUMENT

After the ruling below by the Second Circuit, a clear split now exists regarding the accrual date for claims of fabrication of evidence under Section 1983. Appellate courts previously analogized such claims to those for malicious prosecution and ruled that they accrued after criminal proceedings terminate in the defendant's favor. The Second Circuit instead decided that such claims accrue when a defendant first "knew or should have known" about the harm, in this instance when first made aware "that such [fabricated] evidence was being used."[3] The result of this split is that geography currently determines whether lawsuits alleging serious government misconduct are timely.

The Second Circuit created this split by establishing a rule which overlooks the nature of fabricated evidence claims. Its new rule will muddy ongoing criminal proceedings, squander judicial resources, and impose an improperly narrow view of how such evidence harms those it is used against. The damage

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[3] *McDonough v. Smith*, 898 F.3d 259, 264 (2d Cir. 2018), quoting *McDonough v. Smith*, No. 1:15-CV-01505, 2016 WL 5717263, at *11 (N.D.N.Y. Sept. 30, 2016).

will be compounded if this new rule spreads to additional circuits before the Court grants certiorari.

Criminal defendants simultaneously acting as plaintiffs in civil litigation will be unable to effectively exercise their rights in either system. Relying on an expectation that civil proceedings will be stayed to mitigate the harm of this ruling is inadequate, particularly with the heightened pleading standards introduced by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). These cases will require the accused to make statements about the case with particularity in his complaint. Even without those standards, the creation of a class of civil suits which only exist to be stayed makes little sense, will often contravene the doctrine of ripeness, and will shrink the already small number of attorneys available to take such cases.

This Court briefly touched on these issues in *Wallace v. Kato*, 549 U.S. 384 (2007). However, that case considered a different type of Section 1983 claim, was decided before both *Twombly* and *Iqbal*, and referenced only civil cases entirely unrelated to the extant criminal matter, e.g. "a breach of contract claim against the prime contractor for [a defendant's] new home."[4] The Section 1983 claims at issue here involve statements and evidence from the same events as the criminal matter. This creates a number of complications and obliges parties and judges to engage in the same type of speculation the Court sought to prevent in *Wallace*. We ask the Court to take this case and continue the practice of the majority of circuit courts

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[4] *Wallace v. Kato*, 549 U.S. 384, 396 (2007).

by designating the conclusion of criminal proceedings as the accrual date.

ARGUMENT

I. The Second Circuit Adopted an Improperly Narrow View of the Harm Caused by Fabricated Evidence

The Court should evaluate the petition for writ of certiorari in this case mindful of the severity and frequency of the misconduct at issue. Fabricated evidence is not a black swan; it is an invasive species.

Few doubt the seriousness of this misconduct. This Court has stated that false evidence "involves far more than an injury to a single litigant" and is "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."[5] Even more vigilance is required when those perpetrating the fraud are part of those very institutions.

Often overlooked is the frequency of this misconduct and the variety of people subject to it. The pressure to achieve results – or simply the opportunity to exploit power – has led to both individual examples of fabricating evidence and a series of high-profile scandals in which state actors committed such fraud *en masse* over lengthy periods of time. From line officers in urban police departments to laboratory technicians far removed from personal danger, this misconduct goes well beyond the stereotypical small-town sheriff.

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[5] *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

In Baltimore, Maryland, a police unit known as the Gun Trace Task Force recently engaged in a pattern of falsifying evidence as part of a widespread criminal scheme. The unit was designed to track the firearms responsible for a record rate of homicides in Baltimore by wearing plain clothes and using unmarked vehicles. Instead, the unit became corrupted to the point where "almost every member" was arrested and nearly 1,700 criminal cases were called into question due to issues such as planting drugs on innocent people.[6] The city has yet to determine how this misconduct became so pervasive; a state task force convened to examine the subject had its first meeting last month.[7]

Police officers are not the only state actors engaging in such behavior. In one recent scandal, a single Massachusetts lab technician fabricated evidence affecting *36,000* defendants.[8] This incident was not unique even in its own laboratory – unrelated misconduct by another technician required the dismissal of 10,000 additional cases.[9] Remarkably, the misconduct continued outside the laboratory, as further "fraud upon the court" was committed by two state assistant

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[6] Jessica Lussenhop, *When Cops Become Robbers*, BBC (April 3, 2018), available at https://www.bbc.co.uk/news/resources/idt-sh/when_cops_become_robbers.

[7] Justin Fenton, *'Everything on the Table' as Commission Begins Examining Corrupt Baltimore Police Gun Trace Task Force*, THE BALTIMORE SUN (October 16, 2018), available at https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-gttf-commission-first-meeting-20181016-story.html.

[8] Shira Schoenberg, *SJC Will Decide How to Reimburse Dookhan, Farak Defendants*, MASS LIVE (Sept. 13, 2018), available at https://www.masslive.com/politics/index.ssf/2018/09/sjc_will_decide_how_to_reimbur.html.

[9] *Id.*

attorneys general who "tampered with the fair administration of justice" by manipulating evidence after the laboratory scandal had become public knowledge.[10]

Those accused of drug-related crimes are not the only parties wronged by fabricated evidence. State actors who enforce regulations against large companies may engage in the same fabrication for many of the same reasons. In one such case, an oil refinery learned an employee had submitted a false report to regulators. The company fired the employee, voluntarily disclosed the issue to regulators, and brought the facility back into compliance. The federal government nonetheless decided to prosecute four employees for the incident and issued indictments on ninety-seven counts. There was just one problem – the prosecution was based on fabricated evidence. A state actor had deleted key portions of the record when submitting it to a grand jury, removing the voluntary self-disclosure completely. All charges were eventually dropped against the employees, but only after years of unnecessary and harrowing legal proceedings.[11]

The decision below increases the odds that such myriad wrongs will not be righted. As discussed in Sections II and III, *infra*, the Second Circuit has created a rule which introduces numerous problems into filing Section 1983 claims for fabricated evidence without serving a significant purpose. Additionally, by treating such claims as having accrued at defendant's first exposure to fabricated evidence, it failed to

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[10] *Commonwealth v. Cotto*, No. 2007770, 2017 WL 4124972, at *34 (Mass. Super. June 26, 2017).

[11] Mark V. Holden, *The Second Chance: A Movement to Ensure the American Dream*, 87 UMKC L. Rev. 61 (2018).

understand how such claims differ from other Section 1983 claims such as those for false arrest. Fabricated evidence is not an incarceration with a distinct period, nor is it an object discarded after initial use. It is inextricably bound with the proceedings into which it was introduced for as long as that proceeding continues or can be renewed. Like any piece of evidence, it may be raised in opening statements, with multiple witnesses, and at closing arguments. The jury may consider this evidence, ask questions about it, or even base its verdict on it. Its significance can only be fully measured by defendants and courts after it has been introduced and challenged at the criminal proceeding itself.

II. Having Section 1983 Claims Accrue During the Related Criminal Proceeding Will Traduce the Rights of the Accused and Waste Prosecutorial Resources

The barriers to filing a complex civil lawsuit in federal court were already substantial before the Second Circuit ruling in this case. The filing fee alone is more than a majority of U.S. households have saved in case of emergency.[12] The median cost of the subsequent civil lawsuit is nearly 40 times this amount.[13] By

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[12] BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM: REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017 (May 2018), available at https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf.

[13] Corina D. Gerety, *Excess and Access: Consensus on the American Civil Justice Landscape*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (Feb. 28, 2011), available at http://iaals.du.edu/publications/excess-and-access-consensus-american-civil-justice-landscape. This includes all federal civil cases,

definition, a defendant facing imprisonment due to fabricated evidence is carrying an even heavier burden – he is facing state actors who are willing to break the law they purportedly enforce.

Even if a defendant were to overcome these obstacles and file a timely Section 1983 lawsuit while facing criminal charges, the mere act of doing so would complicate his ability to defend against those charges effectively. First, it will create an additional adversarial relationship between criminal defendant and state agents, raising the threat of defendants being "punished" for filing civil actions. Such vindictiveness is sufficiently common to have a line of case law from this Court, a further reason to grant certiorari in this case.[14] Retaliation by police officers and political officials against citizens who complain about official misconduct is also a well-known and well-litigated phenomenon.[15]

Second, when this Court last spoke on a related issue, it had not yet issued decisions in *Iqbal* and *Twombly*. The pleading standards established by these cases now require criminal defendants such as the petitioner to discuss with specificity the same events which resulted in their prosecution. This puts them in a nearly impossible position. The more detail included in a civil filing, the higher chance that filing

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but it is almost certainly higher for Section 1983 cases due to the low likelihood of settlement.

[14] *Alabama v. Smith*, 490 U.S. 794, 798 (1989) (discussing Supreme Court cases establishing and construing the vindictiveness doctrine).

[15] *See, e.g., Lozman v. City of Riviera Beach*, 681 F. App'x 746, 749 (11th Cir.), vacated and remanded sub nom. *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018).

makes it past a motion to dismiss – and the higher chance those same details will be scrutinized and introduced in the still-ongoing criminal matter.

The complications of concurrent proceedings do not solely affect the criminal defendant. Just as that party must file a civil lawsuit while involved in a criminal matter, the government agents whose behavior is the subject of the Section 1983 claim must defend themselves while continuing their duties. At a minimum, this will require responding to the initial filing, and it may include more intrusive steps such as depositions and discovery about complex issues of subjective intent and objective law, again creating a trial-within-a-trial concurrent with the criminal proceeding. Such entanglement is at odds with the existence and underlying purpose of the qualified immunity doctrine, which is to simplify the performance of official duties.

III. Early Accrual Contravenes the Ripeness Doctrine and Wastes Judicial Resources

By declaring Section 1983 claims to accrue at the moment a defendant becomes aware of fabricated evidence, the Second Circuit effectively asks criminal defendants to walk directly from the police station to the courthouse. This creates a dynamic in which timely lawsuits will in many cases be unripe.

As defined by this Court, "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[16] This contingency is present in myriad

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[16] *Texas v. United States*, 523 U.S. 296, 300 (1998), (internal quotation marks omitted), quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985) (quoting 13A

ways here. A defendant presented with false evidence is virtually never going to have proof of its fabrication by those acting under color of law when initially confronted with such evidence. Yet the ruling below demands that a criminal defendant immediately tell the difference between a mistaken eyewitness, one lying for his own benefit, and one lying due to state fabrication – or the difference between laboratory error and laboratory fraud, the latter of which is often documented years later and in thousands of cases at once.[17] What seems like fabricated evidence may not even exist at all, given the Court's allowance of police to use deceptive tactics during interrogations in order to induce confessions.[18] Police officers can wholly fabricate witness statements and cite physical evidence that doesn't exist when interrogating suspects, muddying the evidentiary picture further for defendants attempting to understand and exercise their rights.[19] Despite this thicket of possible situations and explanations, only a few of which justify Section 1983 litigation, the Second Circuit ruling means that a defendant's claim is purportedly "complete and present" the moment he first hears any untrue evidence.[20]

Just as defendants will be unprepared to properly plead these lawsuits under the Second Circuit's decision, courts will be unprepared to properly judge their merits. It is wasteful of judicial resources to devote them to claims based only on a criminal

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C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3532, p. 112 (1984)).

[17] Schoenberg, *supra* note 8.

[18] *Frazier v. Cupp*, 394 U.S. 731 (1969).

[19] *Oregon v. Mathiason*, 429 U.S. 492 (1977).

[20] *Wallace*, 549 U.S. at 384.

defendant's initial exposure to false evidence. This Court made clear in *Iqbal* that conclusions are not sufficient to support a claim, but what else can a criminal defendant offer at such a nascent stage of proceedings in support of a claim of fabrication than the conclusion that prosecutors or police must be responsible? Such a wide gap between when a claim accrues and when it can be realistically pleaded under modern standards with sufficient factual support does not serve the interests of justice. As criminal trials progress, including through appeals, the source and validity of evidence are brought into the open and challenged as part of the adversarial process. Witnesses often change or recant their stories, and physical evidence is shown to be unreliable or reexamined in a wider context. Only after this examination of the evidence has concluded will Section 1983 claims of fabricated evidence be ripe for adjudication.

This Court indicated in *Wallace* that stays of civil actions "until the criminal case or the likelihood of a criminal case is ended" were sufficient to avoid incomplete or speculative claims.[21] That conclusion should not be relied upon in this case for several reasons. First, as noted in Section I, claims for fabricated evidence are inherently different in nature and severity than those for false arrest, the claim at issue in *Wallace*. Such arrests are pre-trial violations which end the moment a defendant is arraigned or otherwise detained pursuant to legal process.[22] Second, it should not be assumed that stays will be issued. Courts are under no obligation to stay a proceeding if the complaint contains insufficient detail to satisfy pleading

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[21] *Id.* at 394.

[22] *Heck v. Humphrey*, 512 U.S. 477, 484 (1994).

standards, a situation likely here for reasons unrelated to the merits of the claim. Third, a reliance on stays assumes that lawsuits can be brought in the first place. As discussed in Section II, additional statements related to the criminal matter will complicate the defense in that matter, and a concurrent civil suit is a significant burden on those already mounting such a defense. Few criminal defense attorneys would ever advise a client to file a concurrent civil suit as a result.

In addition, the dramatically elongated timeline envisioned by reliance on stays will shrink the already limited number of attorneys willing to bring Section 1983 civil suits. As posited by *Wallace* and the Second Circuit decision here, there are only two possible outcomes for a fabrication of evidence lawsuit filed when first timely – a stay until completion of a criminal trial or a concurrent proceeding with that trial. The stay comes with all the uncertainty of what may come to light during a trial, and the concurrent proceedings mean representing a client with momentous other demands on their time, resources, and loyalties. Neither is an appealing proposition for plaintiffs' lawyers being asked to steward complex litigation against state actors.

The question of remedy is also complicated by early accrual. A timely Section 1983 lawsuit filed during a criminal proceeding faces numerous questions about what remedy or damages are appropriate, many of which hinge on the resolution of that proceeding. If the civil court finds that evidence was fabricated, it can hardly dictate to a separate criminal tribunal that such evidence be withdrawn. Yet any other remedy leaves open the surreal possibility that a criminal defendant could win in civil court and then be

convicted based on the very evidence found to have been fabricated. This goes against the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transactions."[23] Nor can we expect a criminal defendant to properly plead damages when the extent of the harm caused by the fabricated evidence is unknown. The use of fabricated evidence is always a severe affront to justice, but even the damage caused by an unsuccessful prosecution pales in comparison to one that ends with a wrongful conviction.

IV. Having Claims Accrue at the Conclusion of Criminal Proceedings Avoids These Problems

There is a clear solution to these issues, a point at which certainty exists for all parties: the end of the criminal proceeding. As noted in *Wallace*, defendants whose proceedings end with a conviction are expected to address that conviction via appeal, writ of habeas corpus, executive order, or other means of having it declared invalid before filing a Section 1983 claim which would impugn the conviction.[24] The reason for this is made clear: Section 1983 claims, and civil tort actions in general, should not serve as collateral attacks.[25]

The same logic applies without a conviction. While the petitioner here was ultimately acquitted, he should not be punished for having allowed an ongoing crimi-

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[23] *Id.* (quoting 8 S. Speiser, C. Krause, & A. Gans, American Law of Torts § 28:5, 24 (1991)).

[24] *Wallace*, 549 U.S. at 392 (quoting *Heck v. Humphrey*, 512 U.S. 477 (1994)).

[25] *Id.*

nal process to conclude – and the evidence in question to be openly challenged – before filing a civil lawsuit claiming illegal behavior by those conducting that process. We recognize that a criminal defendant is not "absolved from all other responsibilities that the law would otherwise place upon him."[26] Yet the necessity of a fully-developed record is clear in equipping defendants and courts with the information required to properly plead and adjudicate claims of fabricated evidence, particularly since the decisions in *Iqbal* and *Twombly*. The Section 1983 claims in question here are legal obligations directly tied to the criminal proceeding. Having that proceeding conclude first is the appropriate way to address the intolerable wrong of fabricated evidence, conserve prosecutorial and judicial resources, and serve the interests of justice. The majority of circuits are correct, and the Court should grant certiorari to so rule.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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[26] *Id.* at 396.

No. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CRIMINAL DEFENSE ORGANIZATIONS, CIVIL RIGHTS ORGANIZATIONS, AND THE CATO INSTITUTE AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE**

Amici curiae Brooklyn Defender Services, The Legal Aid Society, New York County Defender Services, Neighborhood Defender Service of Harlem, Center for Appellate Litigation, Appellate Advocates, Office of the Appellate Defender, Vermont's Office of the Defender General, and the New York State Association of Criminal Defense Lawyers provide criminal defense and related representation in the Second Circuit to the individuals that will be directly impacted by the decision below—innocent people prosecuted for crimes based on fabricated evidence. They are joined by fellow *amici curiae* the National Association of Criminal Defense Lawyers (NACDL), Human Rights Defense Center, Cato Institute, Association of Criminal Defense Lawyers of New Jersey, California Attorneys for Criminal Justice, and New Mexico Criminal Defense Lawyers Association—leading criminal defense and civil rights organizations outside of the Second Circuit that defend civil liberties, the rights of persons accused of crimes, and the interests of wrongfully convicted persons in asserting their constitutional rights.

Amici share the same fundamental concern with the decision below: It directly conflicts with controlling precedent from this Court, conflicts with the de-

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* Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

cisions of at least five other circuits, has no grounding in practical reality, imposes an unfair and unworkable burden on individuals exercising fundamental rights, and has enormous consequences for the orderly administration of justice. Only this Court can correct the Second Circuit's serious error and restore uniformity to federal law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below held that an individual must bring a claim for the unlawful fabrication of evidence under 42 U.S.C. § 1983 within three years of when that person "learned of the fabrication of the evidence and its use against him in criminal proceedings," and "was deprived of a liberty interest by," for example, an arrest or trial. *McDonough v. Smith*, 898 F.3d 259, 267 (2d Cir. 2018). For nearly all innocent defendants with valid claims, their claims would accrue immediately upon commencement of the proceedings—when they first learn the facts alleged at arraignment, they discern that some fact is fabricated, and bail is set. Consequently, to avoid the time bar, many criminal defendants will be forced to mount § 1983 suits either during a pending criminal trial or while still pursuing its appeal.

That result directly conflicts with this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), which held that one of the elements an individual must plead and prove to win an evidence-fabrication claim is termination of the criminal proceeding in the accused's favor. The decision below literally begins to run the statute of limitations on claims that courts are required, under *Heck*, to dismiss. It also conflicts with this Court's broader pronouncements about the appropriate relationship between federal civil and

state criminal litigation. This Court has consistently held that federal civil litigation must come after the conclusion of state criminal proceedings, both to respect the prerogative of states to adjudicate alleged violations of state law and to bolster the strong judicial policy against inconsistent adjudications in parallel proceedings.

The decision below is also divorced from the practical reality of criminal defense and civil rights litigation. It forces an innocent defendant to make a Hobson's Choice. He can remain silent and hold the state to its fabricated proof—as is his absolute constitutional right—but in doing so risk losing his civil claim. Or he may demand a remedy for the fabrication—as is also his absolute constitutional right—but in doing so undercut the effectiveness of his criminal defense. No criminal defense lawyer would advise a client to bring a parallel civil rights claim during his criminal proceedings that could jeopardize rights or potential defenses. And prosecutors facing civil suits alleging misconduct by their offices (or by other law enforcement officers with whom they work regularly) are less likely to dismiss weak cases and more likely to hyper-aggressively pursue convictions, if only to immunize themselves—and the jurisdictions that elected them—against the civil suit.

The suit itself also prejudices the defendant. Allegations in the civil complaint lock the defendant into divulging myriad facts and details probably unknown to the prosecution, unleash the broad rules of civil discovery, and critically imperil the defendant's absolute right to remain silent during the criminal proceeding and require the state to prove its case beyond a reasonable doubt.

The decision below also has crushing practical consequences. Knowing use of fabricated evidence to bring about the conviction of a criminal defendant is among the most serious misconduct anyone in the criminal justice system can commit. It is also a disturbingly common cause of wrongful convictions. Statistics, anecdotes, cases, and *amici*'s own experience show just how widespread the problem of evidence fabrication is. Because of the decision below, a devastating number of meritorious fabrication-of-evidence claims will never see the light of day. In the Second Circuit alone, countless criminal defendants, along with *amici* who defend and fight for them, will suffer from the fallout of the decision below.

This Court must intervene now to correct this grave error. The issue is outcome determinative, there are no obstacles to review, and the decision below is in direct conflict with this Court's precedent and creates a yawning circuit split. This is a textbook case for the Court's review. The Court should grant the petition for certiorari.

ARGUMENT

I. The Decision Below Directly Conflicts with this Court's Precedents Governing the Relationship Between Civil and Criminal Cases

A. The Second Circuit's Decision Directly Conflicts with *Heck v. Humphrey*

The decision below directly conflicts with *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, this Court held that "[o]ne element that must be alleged and proved" in a § 1983 fabrication-of-evidence suit "is termination of the prior criminal proceeding in favor of the accused." *Id.* at 484. But the Second

Circuit's rule expressly contemplates that, to meet the statute of limitations, many plaintiffs will need to file § 1983 fabrication-of-evidence suits before criminal proceedings have terminated *at all*, let alone in the accused's favor. *See McDonough*, 898 F.3d at 266-67 (2d Cir. 2018). The Second Circuit's rule thus forces Plaintiffs to file suits that may be subject to mandatory dismissal under *Heck*. The decision below glossed over the obvious and direct conflict with *Heck*. Unsurprisingly, every other circuit to have considered the issue has come out the other way. *See* Pet. 13 (citing cases).

The Second Circuit's rule demands that criminal defendants and individuals pursuing criminal appeals flood the courts with unripe claims that courts will be obligated to dismiss. Even if courts stay these cases rather than dismiss them—something they have no obligation to do—this Court has consistently looked unfavorably on the "empty formality [of] requiring [plaintiffs] to file unripe ... claims." *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007). Such a requirement fails to "respect[] the limited legal resources available" to parties and courts. *Id.* And it encourages "piecemeal litigation," *id.*, a problem of particular relevance in § 1983 litigation because plaintiffs, like Mr. McDonough, often bring a fabrication-of-evidence claim alongside a claim that accrues after proceedings conclude, such as one for malicious prosecution. *See McDonough*, 898 F.3d at 264.

B. The Decision Below Is Inconsistent with this Court's Guidance About the Appropriate Relationship Between State Criminal and Federal Civil Proceedings

The Second Circuit's decision subverts a bedrock principle of federalism that state courts may "try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37, 43 (1971). This Court has made clear that litigants should resolve criminal trials *first* before seeking relief from a federal court. *See Younger*, 401 U.S. at 46. Federal court interference in state criminal proceedings is reserved for "extraordinary circumstances, where the danger of irreparable loss is both great and immediate." *Id.* at 45. Otherwise, "there should be no interference" with this core state function. *Id.*

The decision below betrays this principle by inviting a flurry of § 1983 actions in federal court that directly implicate the validity of pending or future criminal actions in state court. *Younger* concerned the propriety of federal courts enjoining pending state criminal proceedings. But there is little practical difference between an injunction and a judgment in favor of a § 1983 plaintiff on a fabrication-of-evidence claim. Both usurp the state's ability to take the first pass at adjudicating the quality and legality of the state's evidence in support of allegations that a person has violated state law. Both fail to show a "proper respect for state functions." *Id.* at 44; *cf. Medina v. California*, 505 U.S. 437, 445-46 (1992).

The decision below also offends the longstanding "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Heck*, 512 U.S. at 485; *see Parke v. Raley*, 506 U.S. 20, 29-30 (1992); *Teague v.*

Lane, 489 U.S. 288, 308 (1989); *Vorhees v. Jackson*, 35 U.S. 449, 472-73 (1836). It is axiomatic that such a policy promotes "finality and consistency" and thereby protects the integrity of courts. *See Heck*, 512 U.S. at 485; *see also Montana v. United States*, 440 U.S. 147, 154 (1979) (noting the need to "foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions"). An evidence-fabrication claim is an accusation that the criminal adjudicatory process has been intentionally corrupted and, in the case of a conviction, has reached an incorrect and perhaps tortious result. By requiring many plaintiffs to bring such accusations in a separate court while the prosecution is still pending, the Second Circuit now demands precisely the sort of "parallel litigation over the issues of probable cause and guilt" that *Heck* expressly disallowed. 512 U.S. at 484. The decision below not only contemplates but demands adjudications of the state's evidence in parallel criminal and civil proceedings.

What's more, the Second Circuit's rule is plainly inconsistent with a "basic doctrine" of Anglo-American jurisprudence that courts of equity will not interfere with a criminal trial. *Younger*, 401 U.S. at 43-44; *see* Edwin Mack, *Revival of Criminal Equity*, 16 Harv. L. Rev. 389, 391 (1902); 42 Am. Jur. 2d Injunctions § 206 (2018). The "fundamental purpose" of this centuries-old rule is to preserve the role of the jury to weigh the state's allegations against a defendant, and to avoid multiple legal proceedings over the same transaction or occurrence. *See Younger*, 401 U.S. at 44. Yet the decision below would allow federal courts to adjudicate the veracity of state's evidence, and even confer equitable relief for its fabrication, to § 1983 plaintiffs who are simultaneously

defending themselves from the same evidence at criminal trial.

No other species of § 1983 claim that arises from the validity of the state's allegations against a defendant accrues before the termination of criminal proceedings. Section 1983 claims alleging that a prosecutor has withheld exculpatory evidence from the defendant, *see Brady v. Maryland*, 373 U.S. 83 (1963), accrue only after the termination of criminal proceedings. *See Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 390 (4th Cir. 2014); *Smith v. Gonzales*, 222 F.3d 1220, 1222-23 (10th Cir. 2000). The same is true of § 1983 claims alleging that the state failed to disclose evidence that might impeach the credibility of the state's own witnesses, as required by *Giglio v. United States*, 405 U.S. 150 (1972). *See Rosales-Martinez v. Palmer*, 753 F.3d 890, 896 (9th Cir. 2014). Malicious prosecution claims under § 1983, too, must wait until the conclusion of criminal proceedings. *See Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017) (citing *Heck*, 512 U.S. at 484, 489). The Second Circuit's rule takes the opposite approach, and in doing so turns the relationship between civil and criminal litigation on its head—forcing an innocent accused to choose between vindicating simultaneously valid but competing rights.

II. The Decision Below Is Divorced from the Realities of Criminal Litigation

Given the massive liberty interest at stake in criminal cases, a defense attorney would rarely advise his client to file a concurrent § 1983 fabrication-of-evidence claim while the criminal case remains ongoing. Parallel litigation threatens to "undermine the [defendant's] Fifth Amendment privilege against

self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial [and vice-versa], or otherwise prejudice the case." *SEC. v. Dresser Industries, Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980). Yet, the decision below requires that criminal defendants in many cases do just that, or else forfeit their claims. These risks are unnecessary and unfair, and serve no real countervailing state interest. They are also easily avoided by the bright-line rule adopted in the Third, Fifth, Sixth, Ninth, and Tenth Circuits.

A. Filing a § 1983 Claim During a Criminal Trial Incentivizes the Prosecutor to Secure a Conviction

Prosecutors understand that a conviction generally *Heck*-bars parallel civil claims and thus shields state officials from potential liability for any conduct during the criminal proceedings. Thus, commencing a § 1983 civil action for fabrication of evidence while a criminal case is still pending would encourage prosecutors to resist dismissals, make them more insistent on guilty pleas, and make them even less willing to concede that a case lacks strong evidentiary support or merit.

Prosecutors offended by allegations of misconduct in § 1983 fabrication-of-evidence suits may retaliate by more forcefully pursuing a conviction in the still-ongoing criminal proceeding. That risk is particularly salient in light of prosecutors' immense discretion and the nature of plea bargaining in the modern criminal justice system. Prosecutors are the system's most powerful actors. They have nearly unfettered discretion in making charging decisions, ne-

gotiating plea agreements, and dismissing cases. A criminal defendant's position in plea bargaining is naturally precarious given the wide discretion prosecutors may exercise. Thus, the potential risk of less leniency—or bad faith—in the bargaining process is enough to discourage some defendants from filing meritorious § 1983 claims while their criminal case remains pending. Given that plea bargaining is the presumptive path in a criminal proceeding, the decision below could effectively prevent the vast majority of innocent criminal defendants from ever bringing meritorious § 1983 misconduct cases.

Ideally, prosecutors do not abuse the broad discretion they are afforded, but instead negotiate in good faith to achieve just and equitable outcomes. The filing of a parallel civil § 1983 claim, however, necessarily makes the posture more adversarial. It shifts the prosecutor's goals in bargaining from the desire to accomplish justice to the desire to avoid potential liability for themselves, their law-enforcement colleagues, and their cities or towns. Indeed, in cases with obvious indicia of law enforcement misconduct—for example, a visibly brutalized defendant arraigned on a stand-alone "resisting arrest" charge—many prosecutors in *amici*'s jurisdictions already assume a liability-protective stance from the outset and, knowing civil suit is likely, refuse to dismiss or plea bargain in good faith. The mere specter, then, of civil liability, even without the forced filings contemplated by the decision below, introduces an improper factor to criminal dispositions: prosecutors will seek convictions to avoid liability for their colleagues and jurisdictions. The deluge of civil filings now demanded by the Second Circuit's rule would introduce this improper factor to thousands of new cases—delaying those criminal proceedings and

falsely incentivizing prosecutors to pursue weak cases.

B. Because of the Breadth of Civil Discovery, Parallel Civil and Criminal Litigation Harms Both Prosecutors and Defendants

The decision below does not account for the challenge of conducting contemporaneous civil and criminal discovery—a challenge faced by both the government and the defendant. By requiring defendants to institute parallel civil cases during criminal trials, the Second Circuit's rule threatens to open up prosecutors and defendants to the potentially extreme prejudice of broad civil discovery. Prosecutors and defendants alike could use civil suits to obtain evidence for use in their criminal trials, thus upsetting the careful limits that have been placed on criminal discovery to protect the orderly administration of criminal justice.

Civil discovery is extremely broad in scope. It "requires nearly total mutual disclosure of each party's evidence prior to trial." *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1203 (Fed. Cir. 1987). Rule 26 permits broad discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case ... information within this scope of discovery need not be admissible to be discoverable." Fed. R. Civ. P. 26(b)(1). In contrast, discoverable materials are described with specificity and detail in the criminal context. *See* Fed. R. Crim. P. 16.

One broad divergence between civil and criminal discovery is in the ability to conduct depositions. In the criminal context, a party is permitted to depose only its own witnesses, and only pursuant to a court order in "exceptional circumstances." Fed. R. Crim.

P. 15(a). By contrast, civil discovery rules allow depositions of any person whose testimony would be relevant to the subject of the action—including the accused plaintiff. *See* Fed. R. Civ. P. 26. To establish a § 1983 fabrication-of-evidence claim, plaintiffs require testimony from officers and prosecutors. This testimony is necessary to evaluate the veracity of the evidence presented in the criminal proceeding, to assess the intent of the producers of the evidence, and to establish the causal link between the fabricated evidence and the liberty harm. There is no doubt that prosecutors and law enforcement officers do not wish to be the subject of a deposition regarding the quality and character of evidence they have gathered in an open criminal prosecution. And there is no doubt that an accused defendant should not be the subject of a civil deposition regarding what he knows about purported evidence against him, and how he knows it, when simultaneously facing criminal charges based on the same evidence. The Second Circuit's rule is thus at odds with the structure and goals of the criminal justice system, placing every litigant in a bind as they navigate civil discovery while managing open criminal cases.

The government is the party that most often claims prejudice from contemporaneous discovery in civil and criminal proceedings, given that many of the restrictions in criminal discovery protect the prosecution. *See, e.g., Campbell v. Eastland*, 307 F.2d 478, 487-88 (5th Cir. 1962). The government usually resists civil disclosures because they "jeopardize ongoing criminal investigations or ... confer an unwarranted benefit on the defendant in the pending criminal case and thereby prejudice the ongoing prosecution." Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 208 (1990).

But nothing in the law requires that a court postpone civil discovery or otherwise stay civil proceedings until the termination of the parallel criminal proceeding. *See Mid-America's Process Serv. v. Ellison*, 767 F.2d 684, 687 (10th Cir. 1985) (noting that the trial court exercises discretion in determining whether to postpone discovery). By requiring defendants to institute lawsuits against the very officials procuring evidence to convict them before the termination of ongoing criminal proceedings, the decision below creates a serious risk of governmental discovery abuse.

C. Filing a § 1983 Suit During a Criminal Trial Prejudices Both a Defendant's Criminal Defense and a Defendant's § 1983 Claim

Criminal defendants are severely prejudiced when they must file § 1983 suits during ongoing criminal proceedings.

As an initial matter, they put their own criminal defense at risk. The very filing of a § 1983 complaint requires a criminal defendant to publicly allege facts related to his pending criminal case. To survive a motion to dismiss, a complaint must "contain sufficient factual matter ... to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Filing a complaint that meets the *Iqbal-Twombly* particularity standard may require the waiver of privilege over some information and consequently undermines effective criminal defense. At minimum, it requires an innocent accused to assert myriad facts—perhaps unknown to prosecutors—and reveal defense strategies to establish innocence before the criminal trial even begins. The particularity requirement thus

provides prosecutors with a complete preview of the defense narrative before a jury is even sworn.

Additionally, parallel criminal and civil cases endanger a defendant's Fifth Amendment right to remain silent. Innocent criminal defendants who pursue parallel claims will often be put to an impossible choice: testify in the civil case to meet the burden of production and persuasion, or decline to testify to protect their right to say nothing at all and hold the government to its burden of proof in the pending criminal trial.

The criminal defendant who declines to testify in the civil case prejudices the civil claim. A "claim of privilege is not a substitute for relevant evidence," and civil litigants who invoke privilege are still required to meet their evidentiary burdens. *United States v. Rylander*, 460 U.S. 752, 761 (1983). Thus, the government in a civil case may move for summary judgment based on the lack of testimony from the plaintiff and adverse inferences that can be drawn from the invoking of privilege. But the criminal defendant who testifies in the civil case—likely advised by a civil lawyer rather than a defender—prejudices the criminal defense. The innocent defendant's testimony in the civil action may necessitate divulging certain facts in the pending prosecution that could assist the government in unjustly procuring a conviction.

Thus, a civil plaintiff who is also the subject of a criminal prosecution is in a Catch-22: the defendant must make a "choice between being prejudiced in the civil litigation, if the defendant asserts ... her Fifth Amendment privilege, or from being prejudiced in the criminal litigation if ... she waives that privilege." *Louis Vuitton Malletier S.A. v. LY U.S.A., Inc.*,

676 F.3d 83, 97 (2d Cir. 2012); *see United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 83 (2d Cir. 1995). No plaintiff should be required to choose between being effectively compelled to give testimony and being protected from prosecutorial misconduct. Such a choice of evils is no choice at all. *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1089 n.10 (5th Cir. 1979). But the decision below demands just that result.

The decision below puts innocent criminal defendants in an unnecessary bind. It is adverse to the principle that court-imposed procedures should not require litigants to surrender one constitutional right in order to assert another. *See Simmons v. United States*, 390 U.S. 377, 393-94 (1968).

III. The Question Presented Is Exceptionally Important

The problems with the decision below are not merely doctrinal or logistical. Evidence fabrication is a serious, systemic problem. The decision below will effectively bar many credible claims of evidence fabrication by innocent defendants aggrieved by intentional, outrageous government misconduct. Without the ability to vindicate these claims, defendants in many cases will be entirely without remedy for their constitutional injuries, and state officials who have used false evidence to put innocent people behind bars will face no real consequences. That sort of injustice will hurt everyone—not just criminal defendants. It will undermine public confidence in the courts and increase the likelihood that citizens will be wrongfully convicted.

A. Evidence Fabrication is a Systemic Problem

Evidence fabrication is far from rare. Perhaps the best known sort of fabrication is police officers ly-

ing or stretching the truth on the stand or in documents to obtain a warrant, foreclose pretrial release, prevent the suppression of seized evidence, or secure a conviction. *See* Joseph Goldstein, *"Testilying" by Police: A Stubborn Problem*, N.Y. Times (Mar. 18, 2018), http://perma.cc/KUC9-XCMU (investigation revealing more than 25 occasions since January 2015 in which judges or prosecutors found "a key aspect of a New York City police officer's testimony was probably untrue"). Prosecutors, under pressure to obtain convictions, often turn a blind eye to the practice, which provides an advantage that can be "too much ... to resist." Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 732 (1987).

Fabrication can take even more brazen forms. In several widely publicized scandals, officers have been caught creating or manipulating physical evidence. *See* Paul Duggan, *"Sheetrock Scandal" Hits Dallas Police; Cases Dropped, Officers Probed As Fake Cocaine "Evidence" Turns Out to be Fake*, Wash. Post, Jan. 18, 2002, at A12 (39 cases in Dallas dismissed when material that police laboratory had initially deemed cocaine was actually ground-up sheetrock); Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L. Rev. 545, 549 (2001) (Los Angeles police officers systematically planted evidence and coerced or fabricated witness statements). Officers have also been known to coerce or manufacture confessions, witness testimony, and identifications. *See* Goldstein, *supra* (describing case of officers falsely reporting witness identifications).

Amici have firsthand experience with the human cost of these evils. To take but one example, an at-

torney at one *amicus* organization represented David Ranta, charged with the 1990 killing of a prominent rabbi. Mr. Ranta maintained his innocence from day one. But, facing a purported eyewitness testifying against him and a typed confession with his signature on it, a jury convicted Mr. Ranta and a judge sentenced him to life imprisonment. Even after a woman came forward in 1995 and explained that her husband, and not Mr. Ranta, had killed the rabbi, Mr. Ranta's efforts to vacate or reverse his conviction were unsuccessful. Sixteen years later, however, another witness came forward and admitted that he committed perjury at the trial and that, before he picked Mr. Ranta out of a lineup, a detective had told him "to pick the man with the big nose." Mr. Ranta was finally exonerated and released in 2013 after spending 23 years in prison. *See* Frances Robles, *Man Framed by Detective Will Get $6.4 Million From New York City After Serving 23 Years for Murder*, N.Y. Times (Feb. 20, 2014), http://perma.cc/GSC4-Y6Q4.[1]

Shocking individual cases of fabrication are just the tip of the iceberg. Data suggests that a high percentage of wrongful convictions are based at least in part on fabricated evidence. For instance, 102 of the

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[1] The detective in Mr. Ranta's case, Louis Scarcella, played a role in securing at least fourteen other convictions that have since been vacated, many based on findings or serious accusations of official misconduct. *See Shawn Williams*, Nat'l Registry of Exonerations, http://perma.cc/TYF6-UDHN; Alan Feuer, *Another Brooklyn Murder Conviction Linked to Scarcella Is Reversed*, N.Y. Times (Jan. 11, 2018), http://perma.cc/85SN-HZYN.

first 362 DNA exonerations documented by The Innocence Project (28%) involved false confessions, a paradigmatic type of fabricated evidence. *DNA Exonerations in the United States*, Innocence Project, https://perma.cc/2BZ2-VUGJ (last visited Nov. 6, 2018). Of the 2,293 exonerations logged in the National Registry of Exonerations, 52% indicate official misconduct as a contributing factor; 57% feature perjury or a false accusation; and 24% involve false or misleading forensic evidence. *Exonerations by Contributing Factor*, Nat'l Registry of Exonerations, http://perma.cc/6WJE-2UBA (last visited Nov. 1, 2018). Misconduct was yet more frequent in murder convictions. *See id.*

And in *amici*'s experience, data gleaned from exonerations underestimates the frequency with which fabricated evidence is used against criminal defendants. It does not account for the many prosecutions that are dropped after fabrication comes to light. Nor does it account for fabricated evidence that is suppressed by a judge or disbelieved by a jury.

B. The Decision Below Will Functionally Bar Many Meritorious Evidence-Fabrication Claims

Predictably, all of this fabrication gives rise to many viable claims under § 1983. But the decision below will foreclose a large share of these claims. For the reasons described above, defendants who bring fabrication claims during their criminal proceedings could face dismissal under *Heck*. Criminal defendants whose proceedings take longer than three years to conclude, but who fail to sue, will be time-barred before their claims are even ripe. *See supra* section I.A.

But even defendants whose criminal proceedings take fewer than three years—and who therefore theoretically could bring their claims within the Second Circuit's limitations period—will face severe restrictions. Given the typical timelines of criminal proceedings, many criminal defendants may have only months following their criminal trials to file their civil claims. In the Bronx, for example, misdemeanor cases that reached jury verdicts between 2013 and 2017 were, on average, almost thirty months old. *See* Crim. Ct. of the City of N.Y., *Annual Report 2017*, at 49-50 (2018), http://perma.cc/2B34-XXZA. If a defendant in an average Bronx misdemeanor case had a viable fabrication-of-evidence claim accrue around the time of his arrest, he would have only six months to find counsel, duly investigate the claim, and file a complaint. And that is just for misdemeanors; proceedings tend to be longer for more serious charges, where the consequences of fabrication are even greater.

Elsewhere in America, the time constraints could be even more severe. As of 2013, for example, 539 inmates in Cook County Jail had been held for more than two years awaiting trial, and forty had been held for more than five years. *See* David Thomas, *Burke Criticizes Pretrial Jailing, Extended Stays, Chicago Daily Law Bulletin*, Dec. 11, 2015, http://perma.cc/TKN5-5Q9U.

The rule's practical harshness compounds for claims held by the most vulnerable defendants. For example, one *amicus* organization has several cases still in pretrial proceedings that have been open for more than three years, and the defendant in each of these cases has mental competency issues. Defendants with issues of mental incompetency are the

least capable of filing civil rights claims on their own or finding lawyers to help them. And because of the myriad procedural steps required to evaluate competency, these defendants' cases tend to last the longest. Likewise, serious homicide charges often remain on the courts' dockets for more than three years because homicide cases frequently have no statutory speedy trial requirement. *See, e.g.*, N.Y. Crim. Proc. Law § 30.30(3)(a). Homicide cases are also among the most likely to give rise to fabricated evidence—the evidence is often technical and involves forensics. And yet, given the severe consequences of conviction, a well-advised defendant would be particularly hesitant to file a parallel civil claim during a homicide prosecution. The decision below thus creates a perfect storm: its harshest effects fall on cases most likely to involve fabricated evidence and where defendants are least likely to be able to promptly file civil claims.

C. In Many Cases, an Evidence-Fabrication Claim Under § 1983 is the Only Effective Form of Redress

The error below would matter less if there remained other avenues of relief for someone in the petitioner's shoes. But in many cases where officials use false evidence against defendants, fabrication claims are the only adequate form of redress. Other constitutional torts will often be foreclosed or practically useless. If the fabricating official had "probable cause to believe the proceeding [could] succeed"—a notoriously low bar—or if he lacked malice, then the defendant cannot bring a claim for malicious prosecution. *Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 417 (2d Cir. 1999). False arrest claims, beyond their own doctrinal limitations, generally pro-

vide such inconsequential relief that they are often not worth filing, particularly for defendants tried and incarcerated based on fabricated evidence.

Doctrines of immunity stand as additional barriers. Prosecutors have absolute immunity for all conduct undertaken in their capacity as advocates and, as the decision below demonstrates, that immunity covers even the knowing prosecution of charges based on fabricated evidence. *See* Pet. App. 17a-19a. Police officers have qualified immunity if reasonable officers could disagree about whether there was probable cause. *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). These hurdles do not stand in the way of fabrication claims. *See Ricciuti v. N.Y.C. Trans. Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (holding that presence of probable cause for an arrest does not immunize officer from evidence-fabrication claim and declining to give officer qualified immunity).

The petitioner's own case shows vividly how these barriers work in practice. The Second Circuit held that the prosecutor had absolute immunity from suit under a malicious prosecution theory. A false arrest claim would have been untimely and, even if legally viable, would provide inconsequential relief given that petitioner was subjected to two trials based on fabricated evidence. The evidence-fabrication claim was thus the petitioner's sole path to real recovery. Many more claims will meet a similar fate under the decision below.

IV. The Court Should Grant Certiorari Now

The decision below is an excellent vehicle for this Court's review. It squarely presents an acknowledged circuit split on an important question, this Court's reversal on the question presented would be

outcome determinative, and there are no jurisdictional or other barriers to this Court's review.

At a more practical level, this Court should grant review immediately because the decision below has enormous consequences for *amici* and for the administration of justice in the Second Circuit. Thousands of criminal defendants throughout the Second Circuit are harmed by the decision below, as are *amici*, whose efforts to defend them and vindicate their civil rights are gravely impeded.

The Second Circuit's rule will deter innocent clients with legitimate claims from filing civil suit by forcing them to choose between aggressively and completely defending themselves from the bad act or demanding a remedy from the bad actor. Or it will cause them to flood the courts with unripe claims to avoid the risks posed by the statute of limitations, wasting the resources of courts and litigants alike. Only this Court can correct the Second Circuit's error and restore uniformity to federal law.

CONCLUSION

Amici curiae respectfully urge that the Court grant the petition for certiorari.

Respectfully submitted,

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NO. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF FOR CRIMINAL JUSTICE INSTITUTE OF HARVARD LAW SCHOOL IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Criminal Justice Institute of Harvard Law School is the pre-eminent teaching institution concerning the provision of defense services to indigent defendants. In addition to clinical programs, the Criminal Justice Institute pursues various criminal justice initiatives and engages in broader public education, in areas of constitutional law, research, practice and policy.

SUMMARY OF ARGUMENT

This Court should grant review for all of the reasons detailed in the Petition. *Amicus* respectfully submits this brief to highlight important additional considerations favoring this Court's review.

First, review is warranted because the current circuit split creates an unworkable standard, misinterprets Supreme Court precedent, harms criminal defendants with meritorious §1983 claims, and causes confusion for defendants *and* the courts. The decision below diverges from every other circuit to consider the issue and requires criminal defendants who believe that fabricated evidence has been used against them to file their §1983 suits

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. Petitioner and Respondent have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. *Amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief.

when they "should have known" about the fabricated evidence instead of when the criminal proceedings conclude in the criminal defendant's favor.

The Second Circuit's "should have known" standard harms criminal defendants because it effectively shortens the statute of limitations on §1983 claims for fabricated evidence. The "should have known" standard causes the statute of limitations for these claims to begin running before the criminal proceedings conclude, and forces defendants to either divert attention from their ongoing criminal trials in order to bring a civil action or, more likely, to wait until the trial's conclusion. This standard further hinders criminal defendants from bringing §1983 claims, despite the violation to their rights fabrication of evidence engenders, by creating practical difficulties, including creating challenges to finding competent representation and forcing defendants to bring partial claims. Additionally, the Second Circuit's standard encourages unethical state actors to fabricate evidence against criminal defendants because the chances of being exposed decreases, while harming ethical state actors who will be forced to respond to civil proceedings while in the midst of a criminal prosecution. Moreover, the standard forces courts to engage in a fact-intensive inquiry in order to determine when an individual bringing a §1983 claim had reason to know fabricated evidence was used against him, wasting judicial resources, creating inconsistency, and preventing finality in the process.

Second, the Second Circuit devised the "should have known" standard because it mischaracterized the harm caused to criminal defendants when fabricated evidence is used against them. This Court has recognized that in order to determine the proper date of accrual, we must look to the common law tort most analogous to the claim at hand. Five circuits have understood that fabrication of evidence claims are most analogous to malicious prosecution, stating that in both claims the right at issue is the right to be free from an unjust legal proceeding. However, the Second Circuit disagreed with this consensus and improperly analogized fabrication of evidence claims to false arrest claims. This mischaracterization ignored the immense harm that the *involvement* in criminal proceedings causes to criminal defendants and their families, while also misunderstanding this Court's opinion in *Heck* which makes it clear that the statute of limitations for fabrication of evidence claims does not begin to accrue until the conclusion of the criminal proceedings.

Because the Second Circuit's decision below will create harm to criminal defendants and violates this Court's precedent, the Court should grant review.

ARGUMENT

I. THE CIRCUIT SPLIT CREATED BY THE SECOND CIRCUIT'S INCORRECT DECISION IN *MCDONOUGH* WILL CAUSE TREMENDOUS HARM TO CRIMINAL DEFENDANTS.

For fifteen years, for claims of fabrication of evidence, courts have followed the decision in *Heck v. Humphrey*, which stated that a plaintiff in a §1983 claim may not bring such a claim until his criminal trial has terminated in his favor. *See* 512 U.S. 477, 486–87 (1994). Notably, five circuits have held that the statute of limitations for a §1983 claim based on fabrication of evidence follows this rule and only begins to run *after* the termination of criminal proceedings in the defendant's favor. *See Bradford v. Scherschligt*, 803 F.3d 382, 387-89 (9th Cir. 2015); *Floyd v. Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018) (per curiam); *Castellano v. Fragozo*, 352 F.3d 939, 959-60 (5th Cir. 2003) (en banc); *Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (citing *King v. Harwood*, 852 F.3d 568, 579 (6th Cir. 2017)); *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008). Additionally, the Seventh Circuit has held that upon the violation of a criminal defendant's constitutional rights the statute of limitations does not begin to run until the constitutional violation ends. *See Manuel v. City of Joliet*, 903 F.3d 667, 669-70 (7th Cir. 2018) ("*Manuel II*").

The Second Circuit, however, in its recent *McDonough* decision, held that the statute of limitations in fabrication of evidence claims begins to accrue when the defendant "should have known"

about the evidence being used against him. *See McDonough v. Smith*, 898 F.3d 259, 266 (2d Cir. 2018). The court ruled this way based on a misunderstanding of the wrong done to a criminal defendant when fabricated evidence is used against him in the legal process. While the court asserted that the harm is more analogous to that which occurs when the tort of false arrest takes place, rather than when there is malicious prosecution, *see id.* at 267, this misunderstands the violation at issue here. Given the Second Circuit's admission that it goes against the majority of other circuits in this decision, *see id.*, the norm among circuit courts to apply the law uniformly, *see United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987) (stating that "absent a strong reason to do so, we will not create a direct conflict with other circuits."), and the harm this rule creates for criminal defendants, the Court should grant certiorari to reverse *McDonough* in favor of the correct bright line "favorable termination" accrual rule followed by the majority of circuits and mandated by *Heck*.

A. The Second Circuit Vitiates The Reasoning Behind The Bright Line Rule Set In *Heck* And Creates An Unworkable Standard Potentially Shortening The Statute Of Limitations On §1983 Claims.

The Court in *Heck* established the "favorable termination" accrual rule, which sets forth that, in order to recover damages, a "§1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized

to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *See Heck*, 512 U.S. at 486-87. Under this rule, the statute of limitations for a §1983 claim begins to run only once the criminal proceedings have terminated in the defendant's favor. *See id.*

In *McDonough*, however, the Second Circuit held that *Heck* does not apply to §1983 claims based on fabrication of evidence, incorrectly ruling that fabrication of evidence is analogous to the tort of false arrest, which this Court has held is excepted from the *Heck* rule, *see Wallace v. Kato*, 549 U.S. 384, 393-94 (2007), since "the injury for this constitutional violation [fabrication of evidence] occurs at the time the evidence is used against the defendant to deprive him of his liberty . . ." *See McDonough*, 898 F.3d at 267. Therefore, the Second Circuit held that the statute of limitations begins to accrue when the criminal defendant "should have known" about the fabrication of evidence – even when that is well before the criminal proceedings end. *See id. Heck*, however, was clear: a plaintiff seeking damages in a §1983 claim requires "the district court [to] consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence [and] if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *See Heck*, 512 U.S. at 487. That is exactly the case here. Part II of the brief will explain more in depth why the Second Circuit was incorrect to analogize fabrication of evidence to false arrest, rather than malicious prosecution – as every other circuit to consider the issue has. However, in sum, *Heck* applies to

fabrication of evidence because both fabrication of evidence and malicious prosecution charges center around state actors committing tortious conduct in order to attain a criminal conviction against the defendant. Therefore, in both *Heck* and in the instant case, the harm is ongoing through the end of the criminal proceedings and, as such, any §1983 suit will effectively and improperly imply the invalidity of the conviction.

In essence, the Second Circuit is either requiring criminal defendants to vitiate *Heck*'s reasoning and attack their criminal conviction while the proceedings are ongoing, or to follow *Heck* and forfeit much, if not all, of the statute of limitations. Given Supreme Court precedent, and the fact that the violation of McDonough's rights continued throughout the very taxing criminal trial he was forced to endure, the statute of limitations for his claim should have accrued only three years after the favorable termination of his criminal trial. However, per the Second Circuit's ruling, McDonough's statute of limitations for his §1983 claim began accruing well before *Heck* permits.

B. Even If *Heck* Does Not Foreclose Criminal Defendants From Filing A §1983 Lawsuit While Their Criminal Case Is Pending, The Second Circuit's Decision Should Still Be Reversed.

Even accepting the Second Circuit's logic that the *Heck* bar does not apply to §1983 claims based on fabrication of evidence, this rule would create too much harm for criminal defendants with meritorious §1983 claims and put strains on the courts.

Specifically, it would: 1) hinder criminal defendants' ability to bring §1983 claims; 2) create a complex legal framework for courts to apply, making harsh outcomes for defendants a likely possibility; 3) make it difficult for criminal defendants to find competent counsel; 4) reduce the punishment for the unethical state actors engaging in this fabrication of evidence while harming ethical state actors; 5) encourage defendants to bring partial claims; and 6) cause confusion in the lower courts.

1. The Second Circuit's rule is harmful to criminal defendants by hindering their ability to bring meritorious §1983 claims.

Under the Second Circuit's rule, defendants in the middle of a criminal trial will be forced to file a §1983 claim before they know whether they will be convicted of a crime, and, thus, before they know whether such a claim will be moot. Given the obvious difficulty of filing a civil claim while defending oneself from a criminal prosecution, and for the reasons stated below, this standard effectively shortens the statute of limitations for §1983 claims because defendants will be forced to wait until after the conclusion of their trial to even contemplate bringing a civil action. The Second Circuit's decision therefore infringes on the rights of criminal defendants by reducing their ability to bring civil claims and shortening the statute of limitations if they do.

Moreover, a defendant who suspects the use of fabricated evidence at his criminal trial may not

immediately know that it was intentionally fabricated. The "should have known" standard imputes knowledge onto an individual under intense duress. The point at which the defendant *should* have known is thus likely to differ from when he *did* know. The incredible deference to the court's fact-finding abilities thus not only muddies the process around making §1983 claims and consumes greater judicial resources, but also infringes on the rights of defendants who learn of the fabricated evidence used against them at a later point than when the court determines they *should* have known.

2. The Second Circuit's ruling creates practical difficulties forcing courts to engage in complicated factual determinations likely to negatively affect criminal defendants.

This Second Circuit's standard also creates practical difficulties by requiring a court in a §1983 case to consider events from a criminal defendant's perspective. That is, the court must necessarily consider how clear it was to the individual that some of the evidence being presented at trial was fabricated. While this might seem clear, there are many factors that can make this determination more complicated. For example, considering the trust normally accorded government officials, a typical criminal defendant who hears about fabricated witness testimony will not necessarily suspect that a prosecutor or police officer fabricated evidence. Instead, the criminal defendant will likely believe

the seemingly more plausible theory that a witness has misremembered events or even that he himself has a faulty recollection. While a court may take this and other contextual factors into account when applying the Second Circuit's rule, their failure to do so could have serious implications for meritorious §1983 claims and the defendants who have the right to bring them. Therefore, the Court should remove the possibility all together by reversing the *McDonough* decision.

3. The Second Circuit's standard makes it difficult for defendants to be competently represented by counsel.

As explained above, *McDonough* complicates the process for bringing a §1983 claim for fabrication of evidence and, as a result, makes it more difficult for defendants bringing fabrication of evidence claims to navigate this area of the law. At the same time, the Second Circuit's standard makes it more difficult for these same individuals to obtain competent counsel to assist them.

Many criminal defendants are incarcerated in pre-trial detention – before and during their trials, *see* Lauren Kelleher, *Out on Bail: What New York Can Learn from D.C. About Solving A Money Bail Problem*, 53 Am. Crim. L. Rev. 799, 799 (2016) ("Pick any day and at least sixty percent of the jail population in the United States is composed of pretrial detainees."), making it difficult for them to find counsel to assist in bringing their §1983 claims. *See, e.g., Wallace*, 549 U.S. at 389

(explaining that incarcerated victims face limitations in bringing §1983 suits). Furthermore, if a criminal defendant is forced to bring his claim before the criminal trial concludes, potential attorneys will not only have inadequate factual information but will also be unsure if the claim will even survive trial. *See Heck*, 512 U.S. at 484–87. That is, if the criminal defendant is convicted, his §1983 claim immediately becomes moot. *See id.* Thus, risk-averse attorneys will be wary to take a case which may not only be dismissed on procedural grounds, but also involve a client unable to pay attorney fees given his circumstances. Therefore, even criminal defendants who are not detained will have trouble finding counsel to assist in their §1983 suits.

As a result, a criminal defendant unable to retain counsel for their §1983 suit may choose to forego their claims altogether, especially if they think that filing a civil claim of this nature could negatively affect the outcome of their criminal trial. Without counsel to inform the criminal defendant of the way the criminal and civil claims interact, the defendant may make ill-informed decisions that prevent him from remedying the violation of his rights that fabrication of evidence causes.

Moreover, even if the criminal defendant finds counsel for his §1983 suit, the counsel will face difficulties in gathering all of the necessary information and building the case with the incarcerated criminal defendant unable to provide substantial help. *See, e.g.*, Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998

U. Ill. L. Rev. 1, 17-22 (1998) (describing the difficulties for counsel in successfully preparing for trial with a client who is incarcerated); *see also* John D. Parron, *Pleading for Freedom: The Threat of Guilty Pleas Induced by the Revocation of Bail*, 20 U. Pa. J. Const. L. 137, 151 (2017) ("A defendant who is detained will often have trouble communicating with his attorney and preparing for trial"). Under such conditions, criminal defendants will be discouraged from filing §1983 claims and, when they do, hindered in their ability to be successful.

Conversely, under the rule followed by five other circuits, criminal defendants can be sure that their claims will not be barred if they wait until after their criminal proceedings conclude to file suit. At this time, they will usually not be incarcerated when they have to find counsel and prepare the case, and they will have finished the stressful, time-consuming, and resource-draining event that is a criminal trial, such that they can focus on finding adequate representation to remedy the violation of their constitutional rights.

4. The Second Circuit's rule encourages unethical state actors to fabricate evidence while harming ethical state actors.

Since the Second Circuit's standard makes it more difficult to bring §1983 claims, bad actors who fabricate evidence are less likely to be subject to legal process. As the Second Circuit has stated before, and repeated in *McDonough*, "[t]he forwarding by an investigating officer to a prosecutor

of fabricated evidence, or . . . the alleged creation or use of such evidence by both investigating officers and the prosecutor, 'works an unacceptable corruption of the truth–seeking function of the trial process.'" 898 F.3d at 266 (quoting *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)). The Second Circuit's rule however makes it easier for officials to engage in this sort of corrupt action by erecting barriers for defendants to file civil claims disputing this sort of action. The *McDonough* decision therefore reduces the disincentives for rogue state actors to fabricate evidence in order to get a conviction and also infringes on the constitutional rights of the victims of such action by making it harder for them to seek recourse.

On the other hand, ethical state actors who have not fabricated evidence will be harmed by the Second Circuit's decision. Since, under *McDonough*, a criminal defendant who suspects that evidence against him has been fabricated must file suit while the criminal proceeding is outstanding, the prosecution will have to deal with discovery requests, and possibly media attention, regarding the civil suit while still in the midst of the criminal prosecution. Essentially, prosecutors will be forced to defend themselves against discovery requests, and potentially turn over evidence to the defense that they would not have had to otherwise, while they are still prosecuting the criminal defendant. Thus, the Second Circuit's decision in *McDonough* encourages unethical state actors to more blatantly violate the law while punishing ethical state actors who committed no wrongs.

5. The Second Circuit's rule forces defendants to bring partial claims.

The *McDonough* decision will also lead to criminal defendants bringing partial claims because, under the Second Circuit's decision, defendants will file §1983 claims while their criminal trial is ongoing. However, this will occur far before they have had a chance to fully understand the scope of the evidence fabrication. The Second Circuit itself has stated that "piecemeal and wasteful litigation" should be avoided, *see Marcel Fashions Grp., Inc. v. Lucky Brand Dungarees, Inc.*, No. 17-cv-0361, 2018 WL 3650826, at *4 (2d Cir. Aug. 2, 2018) (quoting *N. Assurance Co. of Am. v. Square D Co.*, 201 F.3d 84, 89 (2d Cir. 2000)), and this is exactly the type of litigation this standard engenders. The Court should seek to deter the filing of a civil claim while a criminal proceeding is ongoing — as the Court enshrined in *Heck* — and thereby discourage the filing of partial claims in a manner that is detrimental to individuals who have had their rights infringed. The Court should thus also grant review to prevent piecemeal and wasteful litigation.

6. The circuit split will cause confusion and uncertainty in the lower courts.

As it currently stands, a defendant who brings a §1983 claim in Jersey City (Third Circuit) could have an extremely different process than a similarly situated defendant who is just across the Hudson River in Manhattan (Second Circuit). This division between the circuits is confusing and harms

potential plaintiffs by making it harder for them to know the law given its inconsistency. *See Landgraf v. Usi Film Products*, 511 U.S. 244, 265 (1994) (noting that "elementary considerations of fairness dictat[e] that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."). This uncertainty prevents individuals from knowing the law, which is intrinsically unjust, and will create outcomes that are determined by the circuit in which they occur. The Court should thus also grant review to ensure uniformity and fairness across the circuits.

II. THE SECOND CIRCUIT REACHED ITS DECISION BY IMPROPERLY TREATING FABRICATION OF EVIDENCE CLAIMS LIKE FALSE ARREST CLAIMS, RATHER THAN MALICIOUS PROSECUTION AS FIVE OTHER CIRCUITS DO.

Unlike five other circuits, the Second Circuit concluded that malicious prosecution is not the common law tort analogue for fabrication of evidence claims. This Court has ruled that, in order to determine the proper date of accrual, we must look to the common law tort most analogous to the claim at hand. *See Heck*, 512 U.S. at 483. In other words, "a court evaluates the proper accrual date for a claim by identifying the common law analogue for the §1983 claim and applying any distinctive accrual rules associated with that common law analogue." *Bradford*, 803 F.3d at 388 (citing *Wallace*, 549 U.S. at 389-92) (internal quotations omitted). Instead of following the five other circuits, the Second Circuit incorrectly ruled that false arrest was the

appropriate analogue for fabrication of evidence claims.

A. Malicious Prosecution Is The Appropriate Tort Analogue.

Applying *Wallace*, the Ninth Circuit was the first circuit to explicitly establish that fabrication of evidence claims are most analogous to malicious prosecution actions. *See id.* The Ninth Circuit in *Bradford* explained that the right at issue in a fabricated evidence claim is "the right to be free from criminal charges based on a claim of deliberately fabricated evidence." *Id.* (citing *Devereaux v. Abbey*, 263 F. 3d 1070, 1075 (9th Cir. 2001) (internal quotations omitted). Similarly, the court stated that the tort of malicious prosecution "involves the right to be free from the use of legal process that is motivated by malice and unsupported by probable cause." *Id.* (citing *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004)). Thus, the critical similarity between malicious prosecution and fabrication of evidence claims is that they are both centered around the right to be free from an unjust legal proceeding.

The *Bradford* court then examined specific accrual rules that apply to the tort of malicious prosecution. *See id.* at 388-89. Looking to a Fourth Circuit case, the court found that malicious prosecution claims do not accrue until the proceedings against the plaintiff have "terminated in such a manner that [they] cannot be revived." *Id.* (citing *Owens v. Baltimore City State's Atty's Office*, 767 F.3d 379, 390 (4th Cir. 2014); W. Page Keeton, et

al., *Prosser & Keeton on Torts* § 119 (5th ed.1984)). Applying this standard to the claim at hand, the court held that fabricated evidence claims do not accrue until the charges against the defendant are "fully and finally resolved." *Id.* at 389.

Indeed, the Third, Fifth, Sixth, and Tenth Circuits all recognized the correctness of the Ninth Circuit's reasoning and followed the rule set forth in *Bradford*. *See Floyd*, 722 F. App'x at 114; *Castellano*, 352 F.3d at 959-60; *Mills*, 869 F.3d at 484 (citing *King*, 852 F.3d at 579); *Mondragon*, 519 F.3d at 1083. In *Floyd*, the Third Circuit embraced the favorable termination accrual rule, stating that a "claim alleging fabrication of evidence" should be treated "in the same way as [a] claim of malicious prosecution." 722 F. App'x at 114. This was again underscored in *Mills*, in which the Sixth Circuit emphasized that the "basis of a fabrication-of-evidence claim under 1983 is an allegation that a defendant knowingly fabricated evidence against a plaintiff, and that there is a reasonable likelihood that the false evidence could have affected the judgment of the jury." 869 F.3d at 484.

As the bulk of the case law has established, malicious prosecution is the appropriate common law analogue for fabrication of evidence claims. The most obvious and important similarity between the two is that they both center around the misconduct of state officials, mainly prosecutors or police, to attain a criminal conviction. They both offer a recourse for individuals who have been targeted as defendants in unjust trials. Unlike false arrest, both malicious prosecution and fabrication of evidence

"permit[] damages for confinement imposed pursuant to legal process." *Heck*, 512 U.S. at 484. Lastly, as the *Bradford* court noted, both courses of action protect the right to be free from unfair criminal processes. *See* 803 F.3d at 388.

Moreover, the allegations in *Heck*, which this Court held were analogous to the tort of malicious prosecution, are strikingly similar to the allegations in the case below. The complaint in *Heck* alleged that the prosecutors:

> [E]ngaged in an unlawful, unreasonable, and arbitrary investigation leading to petitioner's arrest; knowingly destroyed evidence which was exculpatory in nature and could have proved [petitioner's] innocence; and caused an illegal and unlawful voice identification procedure to be used at petitioner's trial.

512 U.S. at 479 (citation omitted). The allegations in *McDonough* are that the prosecutor presented to the Grand Jury, and in the subsequent trials, an:

> [A]lleged scheme [that] included using forged affidavits, offering false testimony, and using faulty DNA methods for analyzing materials used in processing the ballot applications, all despite Smith knowing that McDonough was innocent.

898 F.2d at 263-64. The Court in *Heck* did not give a name to the petitioner's claim. Instead, the *Heck* Court simply explained that for "claims of the type considered here" the closest analogy came from the "common-law cause of action for malicious prosecution." 512 U.S. at 484. But when comparing the allegations in *Heck* and *McDonough* it becomes clear that there is little difference between them. Both involve altered evidence used by the prosecution to attempt to obtain a conviction. If the allegations in *Heck* were analogous to the tort of malicious prosecution, surely the allegations here are also analogous to malicious prosecution – and not to the inapposite tort of false arrest.

Thus, the distinctive "favorable termination" accrual rule associated with malicious prosecution should be applied to fabrication of evidence claims as well.

B. The Second Circuit Improperly Treated Fabrication Of Evidence Claims Like False Arrest Claims.

Fabrication of evidence claims are critically different from false arrest claims and should not be treated the same way for accrual purposes. One of the key aspects of both malicious prosecution and fabrication of evidence claims is that they center around the unjust legal proceedings. Indeed, fabrication of evidence is unconstitutional for the very reason that it is a "corruption of the truth-seeking function of the trial process." *Ricciuti*, 124 F.2d at 130 (quoting *U.S. v. Agurs*, 427 U.S. 97, 104 (1976)).

By contrast, false arrest claims bear no relation to the legal proceedings against the accused. This Court recognized this critical distinction in *Wallace*, explaining that false arrest claims "end[] once the victim becomes held *pursuant to [legal] process*--when, for example, he is bound over by a magistrate or arraigned on charges. Thereafter, unlawful detention forms part of the damages for the entirely distinct tort of malicious prosecution . . ." 549 U.S. at 389-90 (emphasis in original) (citation and quotation marks omitted). In other words, once lawful proceedings begin against the defendant, the false arrest claim accrues because the false arrest is over. Functionally, there is no overlap between false arrest and fabrication of evidence claims.

Furthermore, since false arrest claims accrue before or as the legal proceedings begin, false arrest claims do not pose *Heck* problems as fabrication of evidence claims do. A criminal defendant is not attacking a criminal conviction through civil action, as *Heck* precludes, since at the time a false arrest claim accrues, there is never an extant criminal conviction. Moreover, it would not make sense to require termination of the proceedings in a manner favorable to the defendant in false arrest cases, because false arrests can still lead to valid convictions. *See Fifield v. Barrancotta*, 353 F. App'x 479, 481 (2d Cir. 2009). On the other hand, fabrication of evidence claims cannot lead to valid convictions because the legal proceedings have been corrupted. *See Riccuiti*, 124 F.3d at 130.

In the *McDonough* decision, the Second Circuit acknowledged that the Third, Ninth, and Tenth Circuits have all held that "the due process

fabrication cause of action accrues only after criminal proceedings have terminated because those circuits have concluded that fabrication of evidence claims are analogous to claims of malicious prosecution . . ." 898 F.2d at 267. Despite this strong consensus, the Second Circuit disagreed, arguing that:

> Because the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be the time he is arrested, faces trial, or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the cause of action accrues. Indeed, the harm—and the due process violation—is in the *use* of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding.

Id. at 267 (emphasis in original). However, this is a mischaracterization of when the harm to the defendant occurs. *Bradford* established that the right at issue in fabrication of evidence claims is the right to be free unjust criminal proceedings. *See* 803 F.3d at 388. In other words, the harm to the defendant is the *involvement* in the unjust proceedings, not just the *outcome* of the proceedings. This Court acknowledged this distinction in *Heck*, where it stated that the critical wrong of the tort of malicious prosecution is the "wrongfulness of the prosecution," which persists through the "lawful

conclusion" of the proceedings. *Heck*, 512 U.S. at 486 n.5.

The Second Circuit's mischaracterization demonstrates a fundamental misunderstanding about *why* fabrication of evidence is harmful. Indeed, it appears that the *Bradford* and *Heck* courts understood something that the Second Circuit does not: mere *involvement* in criminal proceedings can wreak havoc on a defendant's life, even in the event of a "not guilty" verdict. The Second Circuit's decision dangerously disregards all of the ways involvement in an ongoing criminal trial can harm a defendant.

First, criminal trials can be prohibitively expensive and pose an enormous cost burden for defendants, especially for those who do not qualify for state aid. *See Lafler v. Cooper*, 566 U.S. 156, 175 (2012) (Scalia, J., dissenting) (describing the ordinary criminal process as "too long, too expensive, and unpredictable"). In addition to the costs associated with defending oneself, if the criminal defendant is in pre-trial detention, "it places significant financial costs on detainees and their families, who, in addition to suffering the stigma of having a loved one in jail, are also deprived of the detainee's financial support." Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344, 1356 (2014). Furthermore, many criminal defendants in pre-trial detention, even if it is just for a short time while gathering money to pay bail, lose their jobs and are unable to get them back after gaining freedom. *See id.* Although other countries have awarded court costs and legal fees to criminal defendants acquitted at trial, the United

States criminal justice system does not. *See Costs and the Plea Bargaining Process: Reducing the Price of Justice to the Nonindigent Defendant*, 89 Yale L. J. 333, 334-35 (1979). This leaves a defendant who wins an acquittal few means for recovering the costs of trial. *See id.* at 335.

Second, being a defendant in an ongoing criminal trial is extremely time consuming. Importantly, time spent in court or standing trial is often time spent missing work or school. *See* Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 Fla. L. Rev. 761 n. 44 (1999) ("Defendants . . . often will find that the costs of pursuing a trial-time and *wages lost*, lawyer's fees, etc.-will outweigh the magnitude of the sentence likely to be imposed . . .") (emphasis added). This is particularly damaging for defendants who do not have employers that will let them miss work for court dates or jobs that do not afford them the luxury of flexible schedules.

The defendant's education can also be at risk. In fact, in some states, students can be suspended from school indefinitely while they are under criminal investigation or on trial. *See, e.g.*, Mass. Gen. Laws Ann. ch. 71, § 37H 1/2 (West 2014) ("Upon the issuance of a criminal complaint charging a student with a felony or upon the issuance of a felony delinquency complaint against a student, the principal or headmaster of a school in which the student is enrolled may suspend such student for a period of time determined appropriate by said principal or headmaster . . ."). Every minute spent in an unjust legal proceeding is a minute the student

cannot attend school. Thus, criminal legal proceedings, regardless of their result, can seriously disrupt employment and education.

Third, the psychological stress of being involved in ongoing litigation cannot be understated. Defendants, especially ones who know they are innocent, may feel attacked, frightened, and angry. They may experience damage to their reputation in their community and feel that their character is being assassinated. *See, e.g., O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 803 (1980) (Blackmun, J., concurring) ("[T]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, *and his reputation*.") (emphasis added) (quoting 1 W. Blackstone, Commentaries). Collateral consequences of losing their jobs or families are all at stake. The risk of losing one's liberty is alone incredibly anxiety-producing. The risk of spending years behind bars is so stressful that it can even cause innocent people to plead guilty in hopes of gaining a more favorable sentence. *See, e.g.*, National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/trialpenalty report/ ("Guilty pleas have replaced trials for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose. Faced with this choice, individuals almost uniformly surrender the right to trial rather than insist on proof beyond a reasonable doubt").

Notably, courts have allowed plaintiffs to recover substantial damages for mental and emotional distress from malicious prosecutions, even in the absence of a conviction. *See, e.g., Genovese v. Cty. of Suffolk*, 128 F. Supp. 3d 661, 680 (E.D.N.Y. 2015) (allowing $700,000 damage award for emotional damages stemming from malicious prosecution); *Stampf v. Long Island R. Co.*, 761 F.3d 192, 205-08 (2d Cir. 2014) (awarding $20,000 for emotional damages sustained from a malicious prosecution because "returning to work every day with coworkers who were aware that Stampf was arrested for grabbing another coworker's breast would cause some emotional distress"); *Strader v. Ashley*, 877 N.Y.S.2d 747, 751 (3d Dep't 2009) (same); *Zimbelman v. Savage*, 745 F. Supp. 2d 664, 686 (D.S.C. 2010) (same). These cases act as a window into the psychological trauma of standing trial.

Involvement in litigation is costly, time-consuming, and stressful. For these reasons, it makes practical sense that five circuits would classify the right at hand in fabrication of evidence claims as the right to be free from unjust legal proceedings. The Second Circuit's mischaracterization of the right at hand ignores the multiple ways criminal defendants face harm from the mere involvement in criminal legal proceedings.

Based on this mischaracterization, the Second Circuit improperly analogized fabrication of evidence claims to false arrest claims. This resulted in an inappropriate accrual rule that will cause confusion in the courts and harm defendants. Therefore, this Court should grant certiorari to resolve this issue.

CONCLUSION

For the aforementioned reasons, *amicus*, the Criminal Justice Institute urges this Court to accept the Petition for Writ of Certiorari.

Respectfully submitted,

/s/ Ronald S. Sullivan, Jr.

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November 15, 2018

No. 18-485

IN THE
Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: OCTOBER 12, 2018
CERTIORARI GRANTED: JANUARY 11, 2019

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 17-296

EDWARD G. MCDONOUGH,

Plaintiff-Appellant,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Defendant-Appellee.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
01/30/2017	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Edward G. McDonough, FILED. [1958541] [17-296] [Entered: 01/31/2017 11:06 AM]
		* * *
03/23/2017	29	BRIEF, on behalf of Appellant Edward G.

DATE	DOCKET NUMBER	PROCEEDINGS
		McDonough, FILED. Service date 03/23/2017 by CM/ECF, US mail.[1996401] [17-296] [Entered: 03/23/2017 03:47 PM]
		* * *
04/20/2017	37	MOTION FOR LEAVE TO INTERVENE, on behalf of Defendant John J. Ogden, FILED. Service date04/20/2017 by CM/ECF.[2016196] [17-296] [Entered: 04/20/2017 05:24 PM]
		* * *
04/24/2017	41	MOTION ORDER, granting Defendant John J. Ogden's motion to intervene [37]. Beginning 30 days after the date of this order and continuing in 30-day intervals thereafter, Plaintiff-Appellant shall inform this Court in writing of the status of the Rule 54(b) motion. All appellees' briefs are due

DATE	DOCKET NUMBER	PROCEEDINGS
		35 days from the entry of an order granting the Rule 54(b) motion, by RJL, FILED. [2017633][41] [17-296] [Entered: 04/24/2017 10:51 AM]
		* * *
08/30/2017	69	BRIEF, on behalf of Appellee Youel Smith, FILED. Service date 08/30/2017 by CM/ECF. [2114051] [17-296] [Entered: 08/30/2017 04:03 PM]
08/31/2017	70	BRIEF, on behalf of Appellee John J. Ogden, FILED. Service date 08/31/2017 by CM/ECF. [2114399] [17-296] [Entered: 08/31/2017 09:24 AM]
		* * *
09/14/2017	79	REPLY BRIEF, on behalf of Appellant Edward G. McDonough, FILED. Service date 09/14/2017 by CM/ECF, US mail.

DATE	DOCKET NUMBER	PROCEEDINGS
		[2124530] [17-296] [Entered: 09/14/2017 12:23 PM]
		* * *
08/03/2018	94	OPINION, affirming the district court judgment, by DJ, RR, CFD, FILED.[2358554] [17-296] [Entered: 08/03/2018 09:10 AM]
		* * *
08/03/2018	100	JUDGMENT, FILED.[2358697] [17-296] [Entered: 08/03/2018 10:43 AM]
		* * *
08/17/2018	103	PETITION FOR REHEARING/REHEARING EN BANC, on behalf of Appellant Edward G. McDonough, FILED. Service date 08/17/2018 by CM/ECF.[2370813] [17-296] [Entered: 08/17/2018 03:40 PM]
		* * *

DATE	DOCKET NUMBER	PROCEEDINGS
08/30/2018	133	AMICUS BRIEF, on behalf of Amicus Curiae American Civil Liberties Union, Bronx Defenders, Brooklyn Defender Services, Center for Appellate Litigation, Connecticut Innocence Project, National Association of Criminal Defense Lawyers, Neighborhood Defender Service of Harlem, New York County Defender Services, New York State Association of Criminal Defense Lawyers, Office of the Appellate Defender, The Innocence Project, The Legal Aid Society and Vermont Office of the Defender General, FILED. Service date 08/30/2018 by CM/ECF.[2379447] [17-296] [Entered: 08/30/2018 03:24 PM]
		* * *
09/12/2018	136	ORDER, petition for rehearing en banc denied,

DATE	DOCKET NUMBER	PROCEEDINGS
		FILED.[2387882] [17-296] [Entered: 09/12/2018 02:58 PM]
09/19/2018	137	JUDGMENT MANDATE, ISSUED.[2392851] [17-296] [Entered: 09/19/2018 03:39 PM]
		* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Docket No. 1:15-cv-01515-MAD-DJS

EDWARD G. MCDONOUGH,

Plaintiff,

v.

YOUEL C. SMITH, III, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Defendant.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/18/2015	1	COMPLAINT against All Defendants (Filing fee $400 receipt number 0206-3519743) filed by Edward G. McDonough. (Attachments: # 1 Exhibits A-K; # 2 Civil Cover Sheet)(lah) (Entered: 12/22/2015)
		* * *
02/05/2016	12	First MOTION to Dismiss for Failure to State a Claim Motion Hearing set

DATE	DOCKET NUMBER	PROCEEDINGS
		for 3/15/2016 10:00 AM in Albany before U.S. District Judge Mae A. D'Agostino Response to Motion due by 2/29/2016 Reply to Response to Motion due by 3/4/2016. filed by William A. McInerney. (Attachments: # 1 Affidavit, # 2 Memorandum of Law, # 3 Affirmation of ECF service) (Long, James) (Entered: 02/05/2016)
		* * *
02/29/2016	36	RESPONSE in Opposition re 12 First MOTION to Dismiss for Failure to State a Claim filed by Edward G. McDonough. (Attachments: # 1 Exhibit(s))(Premo, Brian) (Entered: 02/29/2016)
		* * *
03/03/2016	40	MOTION to Dismiss , MOTION to Dismiss for Failure to State a Claim Motion Hearing set for 4/5/2016 10:00 AM in

DATE	DOCKET NUMBER	PROCEEDINGS
		Albany before U.S. District Judge Mae A. D'Agostino Response to Motion due by 3/21/2016 Reply to Response to Motion due by 3/25/2016. filed by Daniel B. Brown, John F. Brown. (Attachments: # 1 Affidavit of John F. Brown, # 2 Affidavit of Daniel B. Brown, # 3 Memorandum of Law, # 4 Certificate of Service) (Steck, Phillip) (Additional attachment(s) added on 3/14/2016: # 5 Exhibit(s) A-C of John Brown Affidavit, # 6 Exhibit(s) A - F of Dan Brown Affidavit, # 7 Application for Search Warrant, # 8 Affidavit in Support of Application for Search Warrant) (ban,). (Additional attachment(s) added on 3/14/2016: # 9 Volume 1, # 10 Volume 1 part 2, # 11 Volume 1 part 3, # 12 Volume 2 part 1, # 13 Volume 2 part 2, # 14

DATE	DOCKET NUMBER	PROCEEDINGS
		Volume 2 part 3, # 15 Volume 3 part 1, # 16 Volume 3 part 2, # 17 Volume 3 part 3) (ban,). (Entered: 03/03/2016)
		* * *
03/21/2016	60	RESPONSE to Motion re 45 Letter Motion from Phillip G. Steck, Esq. for Daniel B. Brown, John F. Brown requesting Permission to file Exhibits submitted to Judge Mae A. D'Agostino filed by Edward G. McDonough. (Attachments: # 1 Exhibit(s), # 2 Supplement Addendum)(Premo, Brian) (Entered: 03/21/2016)
		* * *
04/01/2016	67	REPLY to Response to Motion re 40 MOTION to Dismiss MOTION to Dismiss for Failure to State a Claim filed by Daniel B. Brown, John F.

DATE	DOCKET NUMBER	PROCEEDINGS
		Brown. (Attachments: # 1 Certificate of Service)(Steck, Phillip) (Entered: 04/01/2016)
		* * *
04/11/2016	73	MOTION to Dismiss for Failure to State a Claim Motion Hearing set for 5/17/2016 10:00 AM in Albany before U.S. District Judge Mae A. D'Agostino Response to Motion due by 5/2/2016 Reply to Response to Motion due by 5/6/2016. filed by John J. Ogden. (Attachments: # 1 Affirmation in Support, # 2 Memorandum of Law, # 3 Declaration of Service, # 4 Declaration of Service) (Scott, William) (Entered: 04/11/2016)
		* * *
05/02/2016	86	RESPONSE in Opposition re 73 MOTION to Dismiss for Failure to State a Claim *Ogden* filed by Edward G. McDonough.

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: # 1 Exhibit(s)) (Premo, Brian) (Entered: 05/02/2016)
		* * *
05/05/2016	88	REPLY to Response to Motion re 73 MOTION to Dismiss for Failure to State a Claim filed by John J. Ogden. (Attachments: # 1 Declaration of Service) (Scott, William) (Entered: 05/05/2016)
		* * *
07/13/2016	96	MOTION to Dismiss for Failure to State a Claim Motion Hearing set for 8/16/2016 09:30 AM in Albany before U.S. District Judge Mae A. D'Agostino Response to Motion due by 8/1/2016 Reply to Response to Motion due by 8/5/2016. filed by Youel C. Smith, III. (Attachments: # 1 Affidavit Affidavit of Youel C. Smith, III in

DATE	DOCKET NUMBER	PROCEEDINGS
		Support of Motion to Dismiss, # 2 Memorandum of Law, # 3 Certificate of Service) (O'Connor, Thomas) (Entered: 07/13/2016)
		* * *
07/14/2016	99	AFFIDAVIT re 96 MOTION to Dismiss for Failure to State a Claim by Youel C. Smith, III. (Attachments: # 1 Exhibit(s) 1 - Order to Show Cause and Temporary Restraining Order, Petition and Exhibits "A" through "D" and supporting affidavit of Mirch, # 2 Exhibit(s) 2 - DA McNally's letter application, # 3 Exhibit(s) 3 - Order, # 4 Exhibit(s) 4 - Annual Order 2009 Third Judicial District, # 5 Exhibit(s) 5 - 9.29.09 Consent and Teal Evidence Receipt, # 6 Exhibit(s) 6 - 10.6.09 Teal Evidence Receipt, # 7 Exhibit(s) 7 - 10.1.09

DATE	DOCKET NUMBER	PROCEEDINGS
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DATE	DOCKET NUMBER	PROCEEDINGS
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DATE	DOCKET NUMBER	PROCEEDINGS
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		* * *
09/19/2016	108	RESPONSE in Opposition re 96 MOTION to Dismiss for Failure to State a Claim , 97 MOTION to Dismiss for Failure to State a Claim *to Memorandum of Law and Supporting Attorney Declaration Dkt. 95* , filed by Edward G. McDonough. (Attachments: # 1 Exhibit(s), # 2 Exhibit(s), # 3 Exhibit(s)) (Premo, Brian) (Entered: 09/19/2016)
		* * *
09/26/2016	110	REPLY to Response to Motion re 96 MOTION to Dismiss for Failure to State a Claim filed by Youel C. Smith, III.

DATE	DOCKET NUMBER	PROCEEDINGS
		(O'Connor, Thomas) (Entered: 09/26/2016)
09/26/2016	111	REPLY to Response to Motion re 96 MOTION to Dismiss for Failure to State a Claim *Reply Affidavit of Youel C. Smith* filed by Youel C. Smith, III. (O'Connor, Thomas) (Entered: 09/26/2016)
		* * *
09/26/2016	113	AFFIDAVIT re 111 Reply to Response to Motion by Youel C. Smith, III. (Attachments: # 1 Exhibit(s) 1- Ogden Warrant Affidavit, # 2 Exhibit(s) 2- Lagace supporting deposition, # 3 Exhibit(s) 3- Gonzalez supporting deposition, # 4 Exhibit(s) 4- Welch affidavit, # 5 Exhibit(s) 5- Yando supporting deposition, # 6 Exhibit(s) 6 - Known & Questioned Yando Signatures, # 7 Exhibit(s) 7- GJ

DATE	DOCKET NUMBER	PROCEEDINGS
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DATE	DOCKET NUMBER	PROCEEDINGS
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09/30/2016	114	MEMORANDUM-DECISION AND ORDER:

DATE	DOCKET NUMBER	PROCEEDINGS
		The Court ORDERS that Defendant McInerney's motion to dismiss (Dkt. No. 12) is GRANTED in part and DENIED in part as stated herein; and the Court further ORDERS that Defendants John and Daniel Brown's motion to dismiss (Dkt. No. 40) is GRANTED in its entirety; and the Court further ORDERS that Defendant O'Malley's motion to dismiss (Dkt. No. 50) is GRANTED in its entirety; and the Court further ORDERS that Defendant Robillard's motion to dismiss (Dkt. No. 56) is GRANTED in its entirety; and the Court further ORDERS that Defendant McNally's motion to dismiss (Dkt. No. 64) is GRANTED in its entirety; and the Court further ORDERS that Plaintiff's fabrication of evidence claims are DISMISSED as against all Defendants

DATE	DOCKET NUMBER	PROCEEDINGS
		on statute of limitations grounds; and the Court further ORDERS that Defendants John and Daniel Brown, O'Malley, Robillard, and McNally are terminated from this action; and the Court further ORDERS that the Clerk of the Court shall serve a copy of this Memorandum- Decision and Order on all parties in accordance with the Local Rules. Signed by U.S. District Judge Mae A. D'Agostino on 9/30/2016. (ban) (Additional attachment(s) added on 10/7/2016: # 1 Returned Receipt) (jzm,). (Entered: 09/30/2016)
		* * *
12/30/2016	121	MEMORANDUM-DECISION AND ORDER: The Court hereby ORDERS that Defendant Smith's motion to dismiss (Dkt. No. 96) is GRANTED in its entirety;

DATE	DOCKET NUMBER	PROCEEDINGS
		and the Court further ORDERS that Defendant Ogden's motion to dismiss (Dkt. No. 73) is GRANTED in part and DENIED in part as stated herein; and the Court further ORDERS that Defendant County of Rensselaer's motion to dismiss (Dkt. No. 97) is GRANTED in its entirety; and the Court further ORDERS that Defendants Smith and the County of Rensselaer are terminated from this action; and the Court further ORDERS that Defendants John and Daniel Brown's motion for sanctions (Dkt. No. 89) is DENIED; and the Court further ORDERS that Plaintiff's cross-motion for sanctions (Dkt. No. 90) is DENIED; and the Court further ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision

DATE	DOCKET NUMBER	PROCEEDINGS
		and Order on all parties in accordance with the Local Rules. Signed by U.S. District Judge Mae A. D'Agostino on 12/30/2016. (ban) (Entered: 12/30/2016)
		* * *
01/27/2017	124	NOTICE OF APPEAL by Edward G. McDonough. Filing fee $ 505, receipt number 0206-3913261. (Premo, Brian) (Entered: 01/27/2017)
		* * *
02/17/2017	131	First MOTION for Entry of Judgment under Rule 54(b) Motion Hearing set for 3/21/2017 10:00 AM in Albany before U.S. District Judge Mae A. D'Agostino Response to Motion due by 3/6/2017 Reply to Response to Motion due by 3/10/2017. filed by Edward G. McDonough. (Attachments: # 1 Memorandum of Law, # 2

DATE	DOCKET NUMBER	PROCEEDINGS
		Affirmation) (Premo, Brian) (Entered: 02/17/2017)
		* * *
03/02/2017	135	TEXT ORDER: On February 27, 2017, Defendant John Ogden filed a Letter Request, with the consent of all parties except for pro se Defendant Anthony Renna, seeking a stay of discovery in this matter pending the resolution of Plaintiff's appeal. Dkt. No. 134 . Based upon the reasons set forth in Defendant Ogden's submission, the request is GRANTED and discovery is STAYED. The Rule 16 Initial Conference currently scheduled for March 9, 2017 and the deadline to file a proposed Civil Case Management Plan and exchange Mandatory Disclosures are ADJOURNED without date at this time.

DATE	DOCKET NUMBER	PROCEEDINGS
		Plaintiff's counsel is directed to file a Status Report May 1, 2017. SO ORDERED by Magistrate Judge Daniel J. Stewart on 3/2/2017. (mab) (Entered: 03/02/2017)
		* * *
05/08/2017	142	MEMORANDUM-DECISION AND ORDER granting 131 Motion for Entry of Judgment under Rule 54(b); granting 133 Letter Request: The Court hereby ORDERS that Plaintiff's motion for entry of a final judgment (Dkt. No. 131), joined byDefendant Smith (Dkt. No. 133), is GRANTED; and the Court further ORDERS that the Clerk of the Court shall enter final judgment as to the dismissal of Plaintiff's claims against Defendant Smith; and the Court furtherORDERS that the Clerk of the Court shall serve a copy of this

DATE	DOCKET NUMBER	PROCEEDINGS
		Memorandum-Decision and Order on all parties in accordance with the Local Rules. Signed by U.S. District Judge Mae A. D'Agostino on 5/8/2017.(copy mailed to all non-ecf parties) (ban) (Entered: 05/08/2017)
05/08/2017	143	FINAL JUDGMENT as to defendant Youel C. Smith, III, ONLY. (1) Appeal Notice Attached) (ban). (Copy served via regular mail on all non-ecf parties) (Entered: 05/09/2017)
		* * *
01/22/2019	161	TEXT ORDER: On January 18, 2019, Plaintiff filed a Letter Request, with the consent of all parties, seeking a stay of discovery and further proceedings in this matter pending a decision by the Supreme Court. Dkt. No. 160 . The request is GRANTED and

DATE	DOCKET NUMBER	PROCEEDINGS
		the Rule 16 Initial Conference scheduled for January 31, 2019 and the deadline for the parties to file a proposed Civil Case Management Plan and exchange Mandatory Disclosures are ADJOURNED without date at this time. Discovery and any further proceedings in this matter are STAYED pending review and a decision by the Supreme Court. SO ORDERED by Magistrate Judge Daniel J. Stewart on 1/22/2019. (Copy mailed to pro se defendant). (mab) (Entered: 01/22/2019)
		* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

EDWARD G. MCDONOUGH,

Plaintiff,

v.

Youel C. SMITH III, aka Trey Smith, individually and as Special District Attorney for The County of Rensselaer, New York; Richard J. McNally, Jr., individually and as District Attorney for The County of Rensselaer, New York; Kevin B. McGrath; John F. Brown; William A. McInerney; John J. Ogden; Kevin F. O'Malley; Daniel B. Brown; Anthony J. Renna; Alan T. Robillard; and, The County of Rensselaer, New York,

Defendants.

No. 1:15-CV-1505 (MAD/DJS).

December 18, 2015.

Verified Complaint for Damages from Violation of Rights Under Color of Law (Civil Rights Action)

JURY DEMANDED

NATURE OF ACTION

Plaintiff Edward G. McDonough seeks to recover compensatory and punitive damages, reasonable attorney fees and costs against the named defendants for their actions to deprive him of his fundamental rights to due process, a fair trial, present a defense and equal protection and his public employment as secured to him by the Fourth, Fifth, Sixth and/ or Fourteenth Amendments of the Constitution of the United States and the laws of the United States and New York State, all through the conspiratorial fabrication and use of false testimony in effort to wrongfully indict and maliciously prosecute and convict him for alleged acts he did not commit that do not constitute the crimes charged as a matter of law; all of which was done primarily to protect the named Democratic candidates and operatives and/or others from prosecution, conviction, punishment or adverse political effects for the voter fraud and absentee ballot document forgery they committed to win a September 14, 2009 minor party primary election and/or past elections; cover-up their election crimes and guilt; enable Democratic candidates and/or operatives to defraud voters and forge absentee ballot votes to affect future elections as they had done for decades in the past; and/or other arbitrary and capricious reasons.

The action is predicated on Title 42, U.S. C. §§ 1983 and 1988, the Constitution, laws and statutes of the United States.

Plaintiff seeks compensatory damages for the personal injuries, including emotional distress, mental anguish, substantial attorney fees and costs

he suffered as a direct, foreseeable and natural consequence of the defendants' acts and conspiracy to impede, frustrate and hinder the due course of justice with intent to deprive him of those rights, and their neglect or refusal to prevent said deprivations. He also seeks punitive damages against the individual defendants for their intentional, malicious and unconscionable concerted actions in fabricating false testimony with the intention of using it to deprive him of his property, property interest in his public employment and money, due process liberty interest, right a fair trial and right to present a defense through a wrongful indictment, prosecution, conviction and punishment and the payment of the reasonable attorney fees he incurs in pursuing this action.

PRELIMINARY STATEMENT

District Attorney and Special Prosecutor Acted Beyond Scope of Law and Defendants Conspiratorially Fabricated False Testimony to Indict and Convict Plaintiff

1. This action arises from an unlawfully appointed Democrat Special District Attorney's conspiratorial fabrication of false testimony to scapegoat prosecute a Democrat election official for allegedly writing false data on authenticated applications for absentee ballots ("AAB"), which he did not do and does not constitute the forgery crimes charged as a matter of law, in lieu of prosecuting Democrat candidates and operatives ("Dem C/O") who fraudulently obtained and falsely completed or forged and filed AAB to obtain, forge and file

absentee ballots in forged absentee ballot envelopes to win election ("AB forgery").

2. Specifically, defendants Democrat District Attorney Richard J. McNally, Jr. ("McNally"), Special District Attorney Youel C. Smith ("Trey Smith"), named Dem C/O, police investigator and private-hire Forensic Document Examiner ("FDE") conspiratorially acted to wrongfully prosecute and convict plaintiff Rensselaer County Board of Elections ("BOE") Commissioner McDonough on seventy-four (74) felony charges and thereby cause him to incur enormous defense attorney fees and lose his public employment for allegedly writing false reasons for absentee ballot voting ("Excuses") and names of voter agents to whom absentee ballots were to be released ("AB Agent") on AAB that Dem C/O fraudulently obtained, falsified or totally forged and filed with the BOE to get and falsely vote AB to win the 2009 Working Families Party ("WFP") primary for Troy City Council.

3. The defendants entered an extra-judicial conspiracy prior and/or during a criminal investigation but prior to criminal proceedings to fabricate false testimony to initiate and continue the prosecution of McDonough mainly to protect known and identifiable Dem C/O who committed the AB forgery from prosecution, especially the chief culprits:

(a) *Kevin McGrath* ("McGrath"), brother of a respected Democrat State Supreme Court Justice, convicted drug felon and candidate who brazenly initiated the AB forgery and whose conviction was a *fait accompli,* but was given immunity to provide a basis for the scapegoat prosecution by denying his

own guilt, not incriminating the other Dem C/O who committed the AB forgery and falsely alleging that he saw McDonough write false Excuses on two (2) of many AAB he had voters sign before he or others falsely completed and filed them to obtain and forge their absentee ballot ("AB"). On another occasion, he claimed he heard McDonough talk with candidate John Brown about names he assumed McDonough was going to write on AAB as false AB Agents, which he did not report or allege, even when he publicly proclaimed he was innocent and essentially called the voters who directly incriminated him liars; all of which was uncorroborated, patently incredible and contrary to overwhelming irrefutable evidence that proved his guilt and the falsity of his "cooperation."

(b) *John Brown* ("Brown"), an ambitious, highly politically connected candidate who pushed McInerney into assisting him commit the AB forgery and whose conviction for those crimes and his perjury was a *fait accompli*, but was told by Trey Smith in 2009, 2010 and 2011 that he would not be prosecuted despite substantial known and readily obtainable evidence sufficient to convict him. He was never meaningfully prosecuted or required to provide truthful cooperation that would have incriminated other Dem C/O and exonerated McDonough even after his arrest was imminent in 2011 only because New York State Police ("NYSP") Senior Investigator Christopher O'Brien, Ret. ("Sr. Inv. O'Brien") directed an independent investigation in response to McDonough's actions in defending his innocence and exposing the scapegoat prosecution and thereby obtained readily available evidence sufficient to

convict him without Trey Smith's prior knowledge ("NYSP independent investigation").

(c) *William McInerney* ("McInerney"), the prolific AB forger, friend of McNally, supporter of Brown and operative who also committed AB forgery in support of McNally's 2007 election won by AB, threatened to take everyone down if prosecuted, obtained McNally's legal advice, retained the attorney who represented McNally in his 2007 election and destroyed his cell phone on his attorney's advice and whose conviction for hundreds of AB forgery crimes he committed in 2009 as well as 2008 and 2007 was a *fait accompli*, but was told by Trey Smith in 2009, 2010 and 2011 that he would not be prosecuted despite substantial known and readily obtainable evidence sufficient to convict him. He was also never meaningfully prosecuted or required to provide truthful cooperation that would have incriminated other Dem C/O and exonerated McDonough even after his arrest in 2011 only because of the NYSP independent investigation.

4. The other objectives of the conspiracy were to: (a) protect McNally and Democrat candidates from the adverse political effects of a proper investigation and prosecution; (b) cover-up a decades-long scheme of Dem C/O to defraud public housing residents and forge their AB votes; and (c) enable Dem C/O to commit similar AB forgery in the future.

5. The facts contained in the documents, records and testimony related to the private and criminal investigations of the AB forgery and prosecution of McDonough (hereinafter "record facts") establish that the most plausible reason for the defendants'

acts throughout is the conspiratorial scapegoat prosecution and its objectives.

6. The only reasonable inference to be drawn from the record facts is the scapegoat prosecution of McDonough. In fact, the defendants' conduct is so egregious and otherwise inexplicable that it belies any claim of reasonableness, ignorance or incompetence and makes no sense except when viewed in the context of the conspiracy and its objectives.

7. Democrat McNally unlawfully disqualified himself and had his friend Trey Smith appointed special prosecutor to a broad-scoped investigation of about ten Dem C/O and WFP operatives implicated by substantial evidence in massive AB forgery, including his friend McInerney who forged AB in support of his 2007 election won by AB. Trey Smith then immediately targeted McDonough and conspiratorially fabricated false testimony of Dem C/O and others to prosecute and convict him without probable cause for allegedly writing false voter Excuses and AB Agent names on the many AAB that substantial evidence proved known and identifiable Dem C/O totally forged or falsely completed and filed to obtain and forge AB, instead of prosecuting those guilty Dem C/O for the AB forgery.

8. To do so, Trey Smith, among other things: (a) ignored, did not obtain and buried evidence that would have been sufficient to convict the Dem C/O and exonerated McDonough; (b) gave McGrath immunity, without any legitimate reason, to deny his guilt, falsely incriminate McDonough to set the stage for his scapegoat prosecution and not tell the truth

that would have incriminated other Dem C/O; (c) lied to supervisory NYSP to protect Brown, McInerney and others from prosecution; (d) gave non-prosecution agreements to Dem C/O and others without reason or benefit; (e) fabricated false testimony to present before the Grand Jury and trial juries; and, (f) took extraordinary action before and after trial to ensure that McInerney, Brown and others did not tell the truth that would have exonerated McDonough.

9. Even after the Federal Bureau of Investigation ("FBI") and supervisory NYSP in 2011 conducted independent investigations that resulted in the discovery of more evidence sufficient to convict McInerney, Brown and Anthony Renna ("Renna") without Trey Smith's prior knowledge, Trey Smith then took action to continue the prosecution, cover-up the conspiracy and protect the Dem C/O from any meaningful prosecution by, among other things: (a) effectively quashing a federal investigation; (b) giving extraordinarily favorable plea bargains and/or jurisdictionally defective convictions to McInerney, Brown and all others; and, (c) aiding Brown in misleading the appellate court with blatant material misrepresentations of fact and law in the frivolous appeal he filed to reduce his agreed upon sentence after waiving the right to appeal, until also exposed by McDonough.

10. Most, if not all, of defendants' conspiratorial acts are a matter of record fact, including the following salient ones:

(a) McNally acted outside the scope of legal authority by disqualifying his office and having Trey

Smith appointed to a broad-scoped investigation and prosecution without written motion or legal basis as required by state law, which he much later claimed was done because McInerney and perhaps WFP operatives worked on his past campaign even though, at the time, the only identified suspects were McGrath and Anthony DeFiglio ("DeFiglio") and in any event there was never any legitimate conflict or other reason for his disqualification from the investigation or prosecution of any Dem C/O implicated in the crimes.

(b) Trey Smith prosecuted McDonough for the alleged non-criminal act of writing voter data on authenticated or ostensibly authenticated AAB which Dem C/O fraudulently had voters sign or totally forged without his knowledge and after McDonough stated his intent to expose the scapegoat prosecution joined in the indictment Michael LoPorto ("LoPorto"), whom Rensselaer County Democratic Committee Chair, Thomas Wade ("Chair Wade") did not favor and considered to be a marginal, expendable candidate.

(c) Trey Smith did not prosecute any Dem C/O that substantial known and easily obtainable evidence did and would have proven committed the AB forgery and did not meaningfully prosecute McInerney, Brown or Renna even after they were arrested or about to be arrested in 2011 only because of the NYSP independent investigation.

(d) McNally, soon after the crimes were discovered, advised McInerney to hire the attorney who represented him in his 2007 election by AB, many of which McInerney forged.

(e) McNally advised Dem C/O Robert Martiniano ("Martiniano") in 2010 that he should not disclose his knowledge of the AB forgery to the authorities "because it will all be over soon." Notably, McInerney and Brown made admissions to Martiniano, but Trey Smith had already told them that they would not be prosecuted and told the supervisory NYSP the lie that there was not enough evidence to convict them.

(f) Chair Wade told McDonough that he should not testify before the Grand Jury at the same time (soon after his attorney gave Trey Smith notice of his intent to do so) McNally and McInerney gave McDonough the names of an attorney to hire. Trey Smith threatened to prosecute BOE Commissioner Lawrence Bugbee and treated BOE employees he knew had close relationships with McDonough with hostility. The facts show that was done in concerted effort to keep McDonough from testifying before the Grand Jury because the only purported evidence to be presented against him other than his DNA allegedly being on three (3) AB documents filed at the BOE was the uncorroborated and patently incredible false testimony of McGrath and Investigator John Ogden ("Ogden") which clearly would not have been sufficient for indictment, especially when he disclosed the truth about what occurred in his office on September 14, 2009 in contradiction to the perjury of McGrath and Brown. In fact, McDonough's notice of intent to testify also caused Trey Smith to fabricate the false Grand Jury testimony of BOE employee Kevin O'Malley ("O'Malley) at that time.

(g) McNally made extra-judicial public statements about McDonough, his defense and his attorney that

had a substantial likelihood of materially prejudicing his trial.

(h) Trey Smith acted outside the scope of legal authority by indicting and prosecuting McDonough for alleged acts that did not constitute the crimes charged as a matter of state law.

(i) Trey Smith fabricated false testimony against McDonough in an investigatory capacity and role throughout the investigation, indictment and trials of the case.

(j) Trey Smith fabricated false testimony to present at Grand Jury and two trials to initiate and continue the prosecution of McDonough and convict him for acts he did not commit.

(k) Trey Smith notarized alleged forged signatures of two voters on forgery affidavits he prepared and put in evidence at the Grand Jury to get a grossly over-charged indictment.

(l) Trey Smith made extra-judicial public statements about McDonough, his defense and his attorney that had a substantial likelihood of materially prejudicing his trial.

(m) Trey Smith acted beyond the scope of legal authority by indicting and prosecuting McDonough despite having notice and knowledge that McNally's self-disqualification and his appointment were invalid as a matter of state law.

(n) Trey Smith misled supervisory NYSP with the blatant lie that McInerney and Brown could not be prosecuted because the evidence was insufficient to corroborate accomplice testimony when, in fact, the known and readily available testimonial and

documentary evidence was more than sufficient to do so and convict them.

(o) Trey Smith took extraordinary action first to protect McGrath, Brown, McInerney and other Dem C/O from being prosecuted and later to protect McInerney, Brown and Renna from being meaningfully prosecuted even after they were arrested or about to be only because of the independent NYSP investigation done in 2011.

(p) Trey Smith effectively quashed a federal investigation being conducted into the scapegoat prosecution and AB forgery based on McDonough's complaint of public corruption and falsely accused the FBI Special Agent assigned to investigate McDonough's complaint of public corruption concerning the scapegoat prosecution of misconduct.

(r) Trey Smith and Ogden caused a false complaint of misconduct to be made against Sr. Inv. O'Brien to impugn his credibility and keep him from testifying at trial about the scapegoat prosecution and the nefarious conduct of Trey Smith, Ogden and others.

(s) McNally and Trey Smith acted to prevent the County from commencing action to have the order appointing a special prosecutor nullified, despite having notice and knowledge of its invalidity and that his actions were outside the scope of legal authority.

(t) McGrath, O'Malley, Brown and Ogden gave fabricated false testimony before a Grand Jury to initiate the scapegoat prosecution.

(u) McGrath, O'Malley, Brown, Ogden, McInerney, Dan Brown, Renna and DeFiglio conspiratorially

gave fabricated false testimony at trial to continue the scapegoat prosecution.

(v) Alan T. Robillard ("Robillard"), a private-hire Forensic Document Examiner who is labeled on the world-wide-web site of a Certified Handwriting Examiner as being an "unethical professional liar for hire", effectively became part of the prosecution team, reviewed the indictment, what Trey Smith told him was evidence and gave the patently incredible and subjective fabricated false opinion trial testimony that the AB Agent names and Excuses on all the questioned AAB appeared more likely than not to have been written by McDonough but then said it was overwhelming evidence of his guilt to support the preposterous prosecution theory, corroborate the fabricated false testimony of McGrath, Ogden, O'Malley, Brown, McInerney and Renna to continue the scapegoat prosecution and convict McDonough in return for substantial witness fees (about $100,000.00).

(w) Also, upon Trey Smith's directive, Robillard specifically did not perform a simple ink analysis on Dickenson and thirteen (13) AAB filed on September 10, 2009 and September 14, 2009 because they knew all the entries on them appeared to have been written in the same ink which forensic finding alone would have exonerated McDonough and debunked the theory upon which his prosecution was based by establishing that those AAB were falsely completed or forged by McInerney, Brown and/or other Dem C/O before being filed and that the testimony of McGrath, Brown, Ogden, O'Malley and McInerney to the contrary was false.

11. Above all, Trey Smith unlawfully acted to scapegoat prosecute McDonough and protect the guilt Dem C/O from prosecution by, among other things:

(a) Giving Dem C/O and others immunity or promises of non-prosecution so they remained silent, falsely incriminated McDonough and/or did not tell the truth that would have incriminated the Dem C/O and exonerated McDonough;

(b) Not conducting a proper rudimentary investigation that would have led to the discovery of more evidence sufficient to convict McGrath, Brown, McInerney and other Dem C/O for forging AB and prevented the scapegoat prosecution;

(c) Ignoring, not obtaining and effectively burying evidence sufficient to convict McGrath, Brown, McInerney and other Dem C/O and prevent the scapegoat prosecution;

(d) Fabricating the false Grand Jury testimony of Ogden, Brown and O'Malley to corroborate the false accusations of McGrath as needed to initiate the prosecution; and

(e) Fabricating the additional false trial testimony of DeFiglio, O'Malley, McInerney, Brown, Renna and Robillard as needed to continue and cover-up the scapegoat prosecution after McDonough caused the arrest and ostensible prosecution of McInerney, Brown and Renna.

12. At all times relevant, defendants conspiratorially acted to deprive McDonough of his federal constitutional and statutory rights to due process, a fair trial, present a defense, equal protection and public employment.

13. At all times relevant, defendants initiated and continued the wrongful scapegoat prosecution of McDonough for acts he did not commit that do not constitute the crimes charged as a matter of law without probable cause based solely on fabricated false testimony, with malice and intent to deprive him of his federal constitutional and statutory rights to due process, a fair trial, present a defense, equal protection and public employment.

14. At all times relevant, defendants initiated and continued the wrongful scapegoat prosecution against McDonough without probable cause based solely on fabricated false testimony in order to coerce him into pleading guilty to alleged crimes charged or convict him and thereby deprive him of his federal constitutional and statutory rights to due process, a fair trial, present a defense, equal protection and public employment without excuse or justification and to protect from prosecution those Dem C/O who committed the AB forgery.

15. The defendants' acts also included the criminal violation of state judiciary and penal law, federal civil rights law and/ or other statutes.

16. The insidious mixed-motivated conspiratorial prosecution ended in McDonough's favor on December 21, 2012 when his wrongful prosecution on a seventy-four (74) felony count indictment ended in acquittal and dismissal of all charges after two protracted trials.

17. Nonetheless, there is little doubt that McDonough would have been wrongfully convicted but for the extraordinary acts he took in defending his innocence that, among other things, caused: (a)

the FBI to investigate the AB forgery and scapegoat prosecution in 2011 without Trey Smith's prior knowledge until he effectively stopped it; (b) NYSP Sr. Inv. O'Brien to investigate the AB forgery in 2011, arrest McInerney and make known the imminent arrest of Brown and Renna without Trey Smith's prior knowledge; (c) Trey Smith to ostensibly prosecute McInerney, Brown and Renna as well as fabricate their false trial testimony to cover-up and continue the scapegoat prosecution, which led to the discovery of more evidence of the conspiracy that otherwise would not have been disclosed because those defendants would have invoked their Fifth Amendment rights and remained silent, as planned.

PROCEDURAL REQUIREMENTS

18. Plaintiff is not required to exhaust any administrative procedures prior to suit under the United States Constitution and the Civil Rights Act of 1871.

JURISDICTION AND VENUE

19. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1343 and Rules 18 and 20 of the Federal Rules of Civil Procedure to protect and remedy the deprivation of rights secured by: (a) The Fourth Amendment to the United States Constitution providing for the rights of all persons within the jurisdiction of the United States to be free from unreasonable searches and seizures; (b) The Fifth Amendment right not to be deprived of liberty without due process of law; (c) The Sixth Amendment right to a fair trial; (d) the Fourth Amendment Right to due process of law, both procedural and substantive, and (e) The Civil Rights Act of 1871, 42

U.S.C. § 1983 and § 1988 providing for the protection of all persons in their civil rights as well as compensatory damages, punitive damages, and other relief to redress the deprivation of protected federal constitutional and statutory rights under color of state law.

(d) The unlawful violations of plaintiff's federal constitutional and statutory civil rights complained of herein were committed within the Northern District and State of New York.

20. Venue is proper in this District under 28 U.S.C. § 1391 (b)(2).

21. Venue is appropriate in this district because the alleged conspiratorial acts of the defendants, especially the prosecution and trial of the plaintiff at which all of the named individual defendants gave testimony occurred therein. Also, the only defendant who resides outside of the district contracted with that county and was paid by it to testify in that trial.

Plaintiff

22. Plaintiff, Edward G. McDonough ("McDonough") is a citizen district, residing in the County of Rensselaer, Town of Schaghticoke and State of New York.

23. At all times relevant, plaintiff McDonough was and is employed by defendant The County of Rensselaer, New York, as a full-time Democratic Commissioner of The Rensselaer County Board of Elections.

Defendants

24. Defendant Youel C. Smith III, *aka* and practicing law under the assumed name of "Trey

Smith", ("Trey Smith") is a citizen of the United States and a resident of this district, residing in the County of Rensselaer, State of New York.

25. At all times relevant, defendant Smith was acting in his purported capacity as a Special District Attorney appointed pursuant to an *ultra vires* Order of the Supreme Court of the State of New York. Plaintiff claims against him in his individual and official capacities.

26. Defendant Richard J. McNally, Jr., ("McNally") is a citizen of the United States and a resident of this district, residing in the County of Rensselaer, State of New York.

27. At all times relevant, defendant McNally was employed by defendant County as its elected District Attorney. Plaintiff claims against him in his individual and official capacities.

28. Defendant Kevin B McGrath ("McGrath") is a citizen of the United States and a resident of this district, residing in the County of Rensselaer, State of New York.

29. At all times relevant, defendant McGrath was a private citizen acting in concert and agreement with the named municipal officials, employees and final policymakers in their official capacities. Plaintiff claims against him in his individual and representative capacities.

30. Defendant John F. Brown ("Brown") is a citizen of the United States and a resident of this district, residing in the County of Rensselaer, State of New York.

31. At all times relevant, defendant Brown was a private citizen acting in concert and agreement with the named municipal officials, employees and final policymakers in their official capacities. Plaintiff claims against him in his individual and representative capacities.

32. Defendant William A. McInerney ("McInerney") is a citizen of the United States and a resident of this district, residing in the County of Rensselaer, State of New York.

33. At all times relevant, defendant McInerney was a private citizen acting in concert and agreement with the named municipal officials, employees and final policymakers in their official capacities. Plaintiff claims against him in his individual and representative capacities.

34. Defendant John J. Ogden ("Ogden") is a citizen of the United States and a resident of this district, residing in the County of Rensselaer, State of New York.

35. At all times relevant, defendant Ogden was a private citizen acting in concert and agreement with the named municipal officials, employees and final policymakers in their official capacities. Plaintiff claims against him in his individual and representative capacities.

36. Defendant Kevin F. O'Malley ("O'Malley") is a citizen of the United States and a resident of this district, residing in the County of Rensselaer, State of New York.

37. At all times relevant, defendant O'Malley was a private citizen acting in concert and agreement with the named municipal officials, employees and

final policymakers in their official capacities. Plaintiff claims against him in his individual and representative capacities.

38. Defendant Daniel B. Brown ("Dan Brown") is a citizen of the United States and a resident of this district, residing in the County of Albany, State of New York.

39. At all times relevant, defendant Dan Brown was a private citizen acting in concert and agreement with the named municipal officials, employees and final policymakers in their official capacities. Plaintiff claims against him in his individual and representative capacities.

40. Defendant Anthony J. Renna ("Renna") is a citizen of the United States and a resident of this district, residing in the County of Rensselaer, State of New York.

41. At all times relevant, defendant Renna was a private citizen acting in concert and agreement with the named municipal officials, employees and final policymakers in their official capacities. Plaintiff claims against him in his individual and representative capacities.

42. Defendant Alan T. Robillard ("Robillard") is a citizen of the United States and a resident of the USDC, District of Massachusetts, Boston division, residing in the County of Dukes, State of New Massachusetts.

43. At all times relevant, defendant Renna was a private citizen acting in concert and agreement with the named municipal officials, employees and final policymakers in their official capacities and as a special (contract) employee of sad county for

purposes of the services provided. Plaintiff claims against him in his individual and representative capacities.

44. Defendant The County of Rensselaer, New York ("County") is a municipal corporation and governmental subdivision organized and existing pursuant to the laws of the State of New York, located in this district.

45. Defendant County operates under and pursuant to the laws, policies, practices and customs of the State of New York and the color of authority thereby vested in it.

46. The Rensselaer County Legislature was and is the legislative body of the defendant County vested with authority to enact county laws, ordinances and regulations; to establish municipal policy, custom and practice; and, to perform other legislative and administrative functions,

47. The Rensselaer County Executive was and is the executive body of the defendant County vested with the authority to establish municipal policy, custom and practice; and, to perform other executive and administrative functions.

48. Upon information and belief, at all times relevant, defendants Smith and McNally held themselves out to be, and were, acting within the scope of their employment, official office or agency with the defendant County.

49. Upon information and belief, at all times relevant, defendants Smith, McNally and Ogden acted under color of state law, to wit: under the color and pretense of the statutes, ordinances, regulations,

policies, customs, practice and/or usages of the State of New York and/or the defendant County.

RECORD FACTS COMMON TO CONSPIRATORIAL FABRICATION OF FALSE EVIDENCE, MALICIOUS PROSECUTION, AND ABUSE OF CRIMINAL PROCESS

50. The following record facts were or should have been known to Trey Smith at all times relevant before and/or during his investigation and prosecution of McDonough.

I. McGrath Initiated AB forgery before September 2009.

51. In the summer of 2009, McGrath openly and publicly bragged that he was going to take control of the WFP line for the City of Troy elections away from Republican operative Robert Mirch ("Mirch") and return it to its candidates (i.e. himself and other Democrats).

52. Subsequently, in August 2009, McGrath took action to "beat Mirch at his own game" by approaching several people he knew whom Mirch had enrolled in the WFP ("friend-lies"), including Marc Welch ("MWelch") and Jennifer Taylor ("Taylor").

53. McGrath had those WFP members sign an AAB without completing it, discussing their eligibility to vote by AB or naming an AB Agent.

54. McGrath told some of those WFP members that they would receive an AB when, in fact, he knew that none would, and none did.

55. Upon information and belief, McGrath and/or other Dem C/O then completed those AAB with false

AB Names and Excuses, filed them and obtained the AB released on them.

56. Upon information and belief, McGrath and/or others then falsely voted those AB and filed them in forged AB envelopes (hereinafter, "AB" is absentee ballot individually, or absentee ballot and AB envelope collectively).

A. *Taylor AAB: McGrath Gave McDonough a False Excuse to Write on AAB.*

57. Significantly, on August 24, 2009, McGrath brought the Taylor AAB to the BOE, but McDonough told him it could not be filed because it did not state an Excuse.

58. McGrath then told McDonough the Excuse that he said Taylor gave him and pursuant to lawful BOE practice, McDonough wrote it on the AAB so it could be filed.

59. McDonough did not know the Excuse McGrath gave him was inaccurate or false.

B. *Mirch Discovered McGrath's AB Forgery and Requested Federal Investigation.*

60. On or about September 14, 2009 BOE Commissioner Bugbee told Republican operative Mirch that AAB and AB were filed for some voters he had enrolled in the WFP.

61. Upon information and belief, on September 15, 2009 McGrath taunted Mirch that he had "taken" a number of "his" AB votes from WFP members Mirch enrolled in the WFP.

62. Consequently, on September 15, 2009, Mirch talked to a few of those WFP voters, including Taylor and Dickenson, and discovered they signed

incomplete AAB for McGrath that were falsely completed without their permission and their AB were forged.

63. Mirch then brought Taylor and Dickenson to the polls to vote in person.

64. McGrath saw Taylor and/or Dickinson at the polls and learned that they told Mirch about their falsified AAB and forged AB.

II. Brown, McInerney, DeFiglio and Others Joined in AB Forgery.

65. On or about late August or early September 2009, Brown insisted that McInerney help him commit AB forgery to win the WFP primary.

66. In turn, McInerney had DeFiglio and Renna assist in the AB forgery.

A. *McInerney and DeFiglio Had Voters Sign AAB Before September 10, 2009.*

67. Consequently, on one or about one or more occasions prior to September 10, 2009 McInerney and DeFiglio sought to have public housing WFP residents sign incomplete AAB.

68. Upon information and belief, McInerney and DeFiglio had WFP members sign an AAB without completing it, discussing their eligibility to vote by AB or naming an AB Agent.

69. Upon information and belief, Galuski also assisted McInerney and DeFiglio have voters sign incomplete AAB prior to September 10, 2009.

70. Upon information and belief, McInerney, DeFiglio and/or Galuski told some voters that

signing an AAB "was a new way to vote" or that an AB would be returned to them.

71. No voter gave any Dem C/O permission to write a false Excuse or AB Agent on their AAB, forge their AAB, falsely vote their AB or forge their signature on AB envelope.

72. Upon information and belief, McInerney, Brown, Dan Brown and/or other Dem C/O completed those AAB with false AB Names and Excuses and filed them at the BOE.

73. Upon information and belief, McInerney and/or other Dem C/O also totally forged some AAB for WFP members whose residences they visited before September 10, 2009, when it was discovered that the person moved or did not answer the door.

74. On or about September 10, 2009, about thirteen (13) AAB for voters that McInerney, DeFiglio and Galuski visited were filed at the BOE by Brown or Dan Brown.

75. All of those AAB were falsely completed or forged.

76. Upon information and belief, McInerney, Brown, Dan Brown and/or other Dem C/O obtained, forged and filed the AB released on all of those AAB.

77. On/about September 12, 2009, all the AB released on the AAB filed on September 10, 2009, were filed at the BOE.

78. All those AB were forged,

79. Upon information and belief, McGrath, Brown, Dan Brown, McInerney, DeFiglio, Renna and/or other Dem C/O committed that AB forgery in conspiracy.

80. In short, upon information and belief, McInerney, Brown, Dan Brown and/or other Dem C/O had voters sign incomplete AAB so they could complete them with false Excuses and AB Agents, file them and obtain and falsely vote their AB "the right way" for Democrats.

B. *September 12, 2009: Dem C/O Concerted Effort to Get Signed AAB.*

81. On September 12, 2009, McInerney had McGrath, Brown, Dan Brown, LoPorto, Martiniano, Gary Galuski ("Galuski"), Clement Campana ("Campana"), DeFiglio and Thomas Aldrich ("Aldrich") assist him in an effort to have WFP public housing residents sign AAB.

82. On that date, McInerney, McGrath, Brown, Dan Brown, DeFiglio, LoPorto, Martiniano, Galuski, Campana and Aldrich had WFP members sign an AAB without completing it, discussing their eligibility to vote by AB or naming an AB Agent.

83. At the time, McInerney, McGrath, Brown, Dan Brown, DeFiglio, LoPorto, Martiniano, Galuski, Campana and/or Aldrich told some voters that signing an AAB "was a new way to vote" or that an AB would be returned to them.

84. No voter gave any Dem C/O permission to write a false Excuse or AB Agent on their AAB, forge their AAB, falsely vote their AB or forge their signature on AB envelope.

85. Upon information and belief, later on September 12, 2009, Brown and/or Dan Brown took possession of all those AAB (about 35) that the voters signed that day.

86. Upon information and belief, McInerney, Brown, Dan Brown and/or other Dem C/O completed those AAB with false Excuses and AB Agents names, filed them and obtained the AB released on them.

87. Upon information and belief, McInerney and/or other Dem C/O also totally forged some AAB for WFP members whose residences they visited before September 12, 2009, when it was discovered that the person moved or did not answer the door.

88. Upon information and belief, McInerney, Brown, Dan Brown and/or other Dem C/O obtained, forged and filed those AB.

89. Upon information and belief, McGrath, Brown, Dan Brown, McInerney, DeFiglio, Renna and/or other Dem C/O committed that AB forgery in conspiracy.

90. In short, upon information and belief, McInerney, Brown, DeFiglio, Renna and other Dem C/O had voters sign incomplete AAB so they could complete them with false Excuses and AB Agents, file them and obtain and falsely vote their AB "the right way" for Democrats.

C. *Brown and McInerney Admitted the AB Forgery to Martiniano.*

91. In fact, as discussed below, on September 12, 2009, Brown admitted to Martiniano that he was going to use the AAB to forge signatures on AB envelopes and McInerney told him not to worry about it because all of the AAB were going to him.

92. Also, all the Dem C/O knew that McInerney was the de facto strategist for Troy City Council candidates, supporter of Brown (he called "Mayor"),

key operative for Chair Wade, close associate of Renna and DeFiglio, prolific AB votes gatherer and friend of McNally.

D. *Dem C/O Were Aware of AB Process and Lawful BOE Practice.*

93. At all times relevant, McGrath, McInerney, Brown and other Dem C/O knew about the AB process and related BOE practices.

94. Therefore, at all times relevant, McGrath, Brown, Dan Brown, McInerney, DeFiglio and the other Dem C/O involved in having voters sign AAB knew that an AB could not be obtained by or for a voter unless an AAB was filed.

95. At all times relevant, those Dem C/O knew that an AAB could not be filed unless it was signed by the voter and completed with all required information, including an Excuse.

96. At all times relevant, those Dem C/O also knew that an AB could not be released to anyone but a voter unless an AB Agent was named on his/her AAB.

97. At all times relevant, the named Dem C/O knew that a voter or his/her agent could legally complete an AAB and obtain their AB.

98. McGrath, Brown, Dan Brown and other Dem C/O admitted those facts at trial and none of them can genuinely deny their knowledge of the AB process or related BOE practices.

99. Thus, those Dem C/O knew that they could not obtain and falsely vote an AB unless they first forged or completed a signed AAB with a false Excuse and AB Agent.

100. In fact, AB voting is a simple process involving an AAB, AB and AB envelope.

101. An AAB is a simple, single page document that must be signed and completed by the voter or his agent before it can be filed with the BOE.

102. Once an AAB is completed, signed and filed, an AB and AB envelope is mailed by the BOE to the voter or, if an AB Agent is named on the AAB, released to the AB Agent or any person designated by the voter or an AB Agent to obtain it.

103. Under state law, any of those documents can be completed, filed and/or delivered by or to a voter or any agent of a voter.

104. At all times relevant, it was lawful BOE practice to assist voters and their agents, including political operatives and community activists, properly complete and file AAB.

105. At all times relevant, it was lawful BOE practice to release AB to any person designated by the voter or his/her agent to obtain it.

106. Therefore, the Dem C/O adopted a simple scheme to commit AB forgery in 2009 and prior years, i.e. they targeted public housing voters to defraud them into signing incomplete AAB regardless of whether they were eligible to vote by AB or would vote for Democrat candidates and then completed them with false Excuses and AB Agents to obtain and vote their AB "the right way" because they would be less likely to know, care or complain about it.

107. As discussed below, DeFiglio admitted to Trey Smith and Ogden in October or November 2009 that

the 2009 AB forgery was committed principally by McInerney and Brown and that Dem C/O had engaged in the same AB forgery scheme to defraud public housing voters for at least the prior 25 years, decades before McDonough was a BOE Commissioner.

108. In fact, the subject AB forgery was discovered only because McGrath brazenly targeted some voters Mirch had enrolled in the WFP, Brown wanted as many AB votes as possible and McInerney forged too many AB. For example, when DeFiglio was assisting McInerney, if a voter had moved or did not answer the door, McInerney said *"that one's ours"*, and forged AB documents for that voter.

E. *McGrath and McInerney Told McDonough that Dem C/O Were Going to Engage in Concerted Effort to Obtain AB Votes.*

109. On or about early September 2009, McInerney mentioned to McDonough that Dem C/O were going to engage in a concerted effort to get AB votes for the WFP primary.

110. However, McInerney and all the other Dem C/O involved in effort to have voters sign AAB knew that McDonough was not involved in any campaign for any primary election.

111. Therefore, those Dem C/O should have disclosed to Trey Smith through counsel that McDonough was not involved in their efforts to obtain AB votes, especially after he leaked to the media on or about October 2009 and, thereafter, that McDonough was the primary target.

112. Regardless, the record facts also make it clear that by November 2009, Trey Smith knew that

McDonough did not participate in the campaign activities of any candidate involved in any of the approximately forty (40) primary elections held in 2009.

113. More importantly, as discussed below, Trey Smith and Ogden admitted during McDonough's prosecution that they had no reason to suspect he was involved in the AB forgery until March 2010 when McGrath, for immunity, accused him of writing false Excuses on two of the many AAB he filed in the WFP, Democrat and Independent Party primaries.

114. In truth, the record facts establish that no competent or incompetent investigator could have had reasonable cause to suspect that McDonough falsified AAB or was involved in the AB forgery at any time during Trey Smith's investigation, even after McGrath made his patently false accusations against him.

III. Events of September 14, 2009 at BOE and McDonough's Office: Brown Filed About 30 Forged/Falsified AAB. Brown Gave McDonough/O'Malley False AB Agents/ Excuses for 13 AAB. McGrath Witnessed Brown Give O'Malley False Excuses.

115. On September 14, 2009, Brown brought the AAB (about 35) that he, McInerney, Dan Brown, DeFiglio, LoPorto, Martiniano, Galuski, Campana and/or Aldrich had voters sign on or before September 12, 2009 to McInerney to be photocopied and used to forge AB envelopes.

116. On September 14, 2009, Brown then obtained those AAB from McInerney and brought them to the BOE for filing.

117. Upon information and belief, McInerney, Brown and/or Dan Brown purposely did not falsely complete thirteen (13) of the AAB that Brown filed on September 14, 2009, so that a BOE employee would assist in the filing process by unwittingly writing the false Excuses and AB Agents names they gave them onto those AAB to give them plausible deniability if caught.

118. It may also be that Mirch discovered through Taylor and Dickenson that McGrath was involved in the AB forgery before Brown brought those AAB to the BOE.

119. Brown vaguely admitted at trial that he looked at some of those AAB before he brought them to the BOE and noticed that "some" were completed.

120. Brown also admitted at trial that he did not ask to speak with McDonough and had no specific intent to do so at that time.

121. Brown also admitted at trial that he intended to take the AB released on those AAB to McInerney so he could forge them.

122. In accordance with BOE practice, McDonough reviewed the AAB to ensure that they could be filed and found that all but thirteen (13) were completed and signed.

123. McDonough set aside five (5) AAB that did not name an AB Agent and told Brown that the AB for them would be mailed to those voters and could not be released to him.

124. In response, Brown asked McDonough to write his name as AB Agent on them so the AB could be released to him, but McDonough refused and

reiterated that only an AB Agent name provided by the voters could be entered on any AAB.

125. Brown then used his cell phone and told McDonough that he obtained the AB Agent names that the voters gave to others for those AAB.

126. However, Brown did not obtain that information from the voters.

127. In fact, Brown first telephoned McInerney. He then telephoned WFP Chair James Welch ("JWelch") and WFP Co-Chair Brandt Caird ("Caird") and got their permission to falsely name them as the voters' AB Agents on those AAB.

128. Brown admitted those facts at trial.

129. However, Brown did not admit that he gave those Excuses or AB Names to McDonough and O'Malley or the truth that would have proved the perjury of McGrath and O'Malley, proved the conspiratorial scapegoat prosecution and exonerated McDonough. Instead, he committed more perjury to continue the scapegoat prosecution as discussed below.

130. In any event, McDonough did not know that those voters never gave anyone an Excuse or AB Agent name or that Brown did not obtain them from the voters or their agents.

131. Brown then gave McDonough the names he said the voters gave as AB Agents.

132. In accord with lawful practice, McDonough wrote those names onto those AAB.

133. McDonough also told Brown that (8) AAB did not state an Excuse and they could not be filed

unless Excuses the voters gave were obtained and entered on them.

134. McGrath then came into the room and asked McDonough for assistance.

135. So, McDonough called O'Malley into the office and asked him to help Brown by writing the Excuse any voter gave onto their respective AAB if he obtained it.

136. Brown made telephone calls and told O'Malley the Excuses he said voters gave.

137. In accord with lawful practice, O'Malley then wrote those Excuses onto those eight (8) AAB while sitting across the desk from Brown.

138. McDonough, McGrath, Brown and O'Malley were in the small office at that time.

139. Upon information and belief, O'Malley did not know that those voters never gave anyone an Excuse or that Brown did not obtain them from the voters or their agent.

140. Upon information and belief, Brown, McInerney and/or other Dem C/O forged or falsely completed all of those AAB before Brown brought them to the BOE.

141. At the same time, on September 14, 2009, Brown also brought the AAB for David Daniel ("Daniel") in the WFP primary and AAB for Kathleen DeFabio ("DeFabio"), James Petit ("Petit") and Charles Tangredi ("Tangredi") in the Independent and Democratic Party primaries to the BOE and filed them separately from the other AAB.

142. As discussed below, Brown forged those four (4) AAB and AB released on them.

A. *Brown Asked McDonough to Take the AB Release on AAB to McInerney. McInerney and/or Others Forged Those AB and AB Envelopes.*

143. Before Brown left the BOE that day, he told McDonough that McInerney was returning all the AB released on all those AAB he filed to the voters, but he could not wait for them and asked him to deliver those AB to McInerney at his office in Troy City Hall.

144. As stated, McInerney previously told McDonough that Dem C/O were obtaining AB for the WFP primary and Brown was acting as an agent of all those voters.

145. Therefore, McDonough brought those AB to McInerney when he took a lunch break walk with O'Malley. O'Malley witnessed McDonough leave the AB with McInerney.

146. All those AB were later forged by McInerney and filed at the BOE by Couch at the request of LoPorto.

B. *McInerney Staged Return of AB. Renna Aided Brown in AB Forgery. LoPorto Asked Couch to Take the Forged AB to the BOE.*

147. On September 14, 2009, McInerney met Campana, LoPorto, Brown and Renna purportedly to return AB to the voters who signed AAB on September 12, 2009.

148. Renna then gave Brown a few AB but stopped him from voting them in public.

149. In any event, after only a short time, McInerney announced that they were "done."

150. Upon information and belief, McInerney staged the event to give an appearance that the forged AB were completed by the voters, especially because of McGrath's actions.

151. McInerney testifie d at trial that he forged all of those AB documents.

152. McInerney testified that he did not want to forge all those AB documents because he did not trust the WFP operatives and was concerned the crimes would be discovered, but he was pressured into doing it by all the Democrat candidates, including Brown and LoPorto.

153. Notably, McInerney also testified that he refused to file those forged AB and demanded that one of the candidates do it because he did not want to forge them in the first place, did not trust the WFP and feared that the scheme would be discovered.

154. Upon information and belief, McInerney refused to file those forged AB, more specifically, because McGrath already bragged to Mirch that he took some of "his" AB votes and McInerney rightly expected Mirch did, or would, discover the AB forgery through those voters.

155. McInerney testified at trial that he refused to file those particular forged AB.

156. In his written deposition dated September 16, 2011, McInerney stated that on September 15, 2009 LoPorto called several times and asked if the AB *"were done yet"* and after he forged them he gave them to LoPorto at City Hall in a manila envelope.

157. On September 15, 2009, LoPorto then gave those forged AB to Couch inside a folded newspaper and asked her to file them with the BOE.

158. On September 15, 2009, Couch filed those forged AB at the BOE.

159. McInerney testified that LoPorto knew those AB were forged when he got them.

160. However, McInerney admitted at trial that McDonough was not involved in the solicitation of AAB or forging of AB or aware of his criminal activities.

IV. Private Investigation Obtained Evidence that was Sufficient to Convict McGrath and DeFiglio and Should Have Lead to Discovery of More Evidence Sufficient to Convict Other Identifiable Dem C/O.

161. On or after September 15, 2009, Mirch obtained the BOE Absentee Voter Master List Summary that identified the AB Agents on the AAB filed for the WFP primary. Trey Smith also later obtained that public record, which is incorporated herein by reference.

162. Mirch then hired private investigators to obtain statements from the voters.

163. Investigators obtained affidavits from about thirty-five (3 5) voters who stated that their AAB were falsely completed or totally forged and their AB were forged. Those voter affidavits incorporated herein by reference.

A. Dem C/O Defrauded Voters into Signing Incomplete AAB. Voters Identified McGrath and DeFiglio by Name and/or Described Brown,

McInerney and Other Dem C/O by Appearance. Known and Identifiable Dem C/O Obtained. Forged and Filed AB Documents.

164. Some voters named McGrath and/or DeFiglio and/or described McInerney, Brown, Dan Brown and other Dem C/O as having them sign AAB on September 12, 2009.

165. Voters, therefore, likely would have identified McInerney, Brown, Dan Brown and others if they were shown photographs that accurately depicted their appearance.

166. Again, some voters disclosed that Dem C/O told them that if they signed an AAB an AB would be returned to them or it was "a new way to vote."

167. Therefore the voters' testimony was also compelling circumstantial evidence that McGrath, DeFiglio and identifiable Dem C/O committed the AB forgery in conspiracy.

B. *Dem C/O were Named as AB Agents on Falsely Completed/Forged AAB.*

168. Furthermore, the relevant BOE records showed that the following Dem C/O and WFP operatives were named an AB Agents on the number of falsified and forged AAB as follows: (a) McInerney: *1* (Suozzo); (b) Brown: *1* (Daniel; (c) McGrath: 2 (Taylor and Dickenson); (d) Rick Mason (friend and helper of McGrath): *2*; (e) Michael Leonard (relative of McGrath): *2*; (f) DeFiglio: *6*; (g) JWelch: *7*; (h) Caird: *8*; and, (i) Aldrich: *19*.

169. Aldrich was a known supporter and associate of LoPorto and WFP operatives.

C. *Evidence Was Sufficient to Convict McGrath, DeFiglio and Other Dem C/O.*

170. Therefore, the testimonial and documentary evidence obtained through private investigation by September 2009 was sufficient evidence to prove, among other things, that: (a) Known/identifiable Dem C/O had voters sign an AAB, but not complete it; (b) Dem C/O did not ask voters if they had a valid reason to vote by AB or wanted to name an AB Agent to obtain and deliver their AB; (c) False Excuses and/or AB Agent names were later written on the AAB; (d) The AAB were possessed and filed at the BOE by the Dem C/O; (e) The AAB for other voters were totally forged; (f) The AB released on the falsified/forged AAB were obtained by Dem C/O; (g) All those AB were forged and filed in support of Democrat candidates; (h) The object crime was the false voting of AB; (i) The defrauding of voters, falsification and forgery of AAB, forgery of AB envelope and filing of false documents were crimes ancillary to the false voting of AB; (j) The forged AB documents were direct and likely forensic evidence; and, (j) The Dem C/O who had voters sign AAB and/or were named as AB Agent on falsified/forged AAB were incriminated in crimes or material witnesses (i.e. McGrath, DeFiglio, McInerney, Brown, Dan Brown, LoPorto, Campana, Galuski, Aldrich, JWelch, Caird, Mason, Leonard).

171. In short, that evidence was sufficient to prove that all the AB released on those AAB were forged and filed by known and/or identifiable Dem C/O.

172. That evidence proved and common sense dictated the AB forgery was committed by those who

directly benefited from it, i.e. known and identifiable Dem C/O.

173. That evidence proved and common sense dictated that the AB forgery was committed by those known and identifiable Dem C/O acting in conspiracy.

174. That evidence proved and common sense dictated that anyone who had voters sign AAB, who was named as AB Agent on AAB or who filed AB document(s) committed the AB forgery or were material witnesses, i.e. the Dem C/O.

175. In particular, the affidavits of MWelch and Taylor established that McGrath knew on September 15, 2009 that Mirch brought them to the polls after learning that he had them sign AAB that were later falsely completed and their AB were obtained, forged and filed.

176. Also, numerous voters identified DeFiglio by name as having had them sign AAB that were subsequently falsely completed for release of AB that were forged.

177. Therefore, the record facts establish that the evidence known by September 2009 was sufficient to convict McGrath and DeFiglio of committing the AB forgery with others.

178. As discussed, the record facts also establish that if that evidence was followed by only rudimentary investigation and prosecution tactics it would have led to discovery of more evidence sufficient to convict all the other Dem C/O who committed the AB forgery, specifically Brown, Dan Brown, McInerney and Renna.

179. Furthermore, that evidence proved and common sense dictated that the completion of AAB with false AB Agents and Excuses was integral to the AB forgery.

V. *Lambertsen* Action Commenced to Invalidate Forged AB. Brown Prepared Press Release for WFP to Accuse Mirch of Lying.

180. On September 23, 2009, Christian Lambertsen commenced action to invalidate AB filed by Dem C/O in the WFP based on sixteen voter affidavits, affidavit of Mirch and BOE Absentee Voter Master List Summary.

181. Those papers showed only that: forty-four (44) AB were released to McGrath, Brown, Rick Mason, Thomas Aldrich, DeFiglio, JWelch, Caird and McInerney; at least thirty-five (35) AB were falsely voted and filed with the BOE; and, at least thirty-five (35) AAB were completed falsely after being signed.

182. No particular person was identified as having falsely voted any AB, forged any AB envelope or completed falsely any AAB.

183. However, it was general knowledge and a matter of common sense that only those who stood to benefit from the obvious broad-scoped scheme to falsely vote AB were the Dem C/O who also were known to have been involved in a concerted effort "get out the vote" by AB.

184. On about that same day, Brown asked Welch, Caird and Couch to meet him at LoPorto's Restaurant the next day, and they agreed.

185. Brown also asked McDonough if he would meet him there the next day.

186. McDonough met Brown because he was named in the *Lambertsen* action and upset about the AB forgery, especially after the activity in his office on September 14, 2009.

187. Notably, McGrath, McInerney, DeFiglio, Renna and LoPorto were not present.

188. At the meeting, Brown asked the WFP members to issue a Press Release he and his brother had prepared to publicly accuse Mirch of making false allegations of voter fraud.

189. Couch refused Brown's request and questioned him about the AB forgery.

190. At that time, Brown told Couch that no crimes were committed, *"they were there"* and *"it isn't as bad as it looks"* but he appeared to the others to be acting nervous and "guilty."

191. At that time, Brown did not accuse McDonough of writing false data on any AAB, ask him to make any comments or redirect any questions about the AB fraud to him.

192. McDonough did not know why Brown asked to meet with him, did not know anyone else would be present, did not know who forged the AB documents and was upset about the filing of false AB with the BOE so he asked if anyone was recording the discussion, expressed anger at Brown and WFP about the false use of their names as AB Agents and asked what they were going to do when confronted with prosecution and perhaps jail.

193. Brown admitted those facts at trial and said that he asked McDonough to be there only to explain the AB process, if needed.

194. Brown also admitted that he never talked to McDonough about the AB forgery that he and other Dem C/O committed anytime before, during or after the meeting.

195. Still, Trey Smith introduced McDonough's comments into evidence at Grand Jury and trial as admissions and argued in summation: *"who asks [if anyone was recording the discussion] but a guilty person"*; even though they were innocuous,

196. It is ironic that in doing so, Trey Smith admitted his own liability and role in the conspiratorial scapegoat prosecution when he compelled Sr. Inv. O'Brien to be subjected to an interrogation based on a false allegation of impropriety made against him after he directed the independent NYSP investigation into the AB forgery and scapegoat prosecution, solely to question him about the FBI investigation of McDonough's complaint of public corruption.

197. Specifically, as discussed below, Trey Smith asked Sr. Inv. O'Brien whether the FBI *"bugged"* his office or *"tapped"* his telephone when investigating McDonough's complaint of the scapegoat prosecution, while he perspired so profusely that sweat dripped down his face.

198. Upon information and belief, as admitted by Trey Smith, he would not have made those admissions of guilt unless he was involved in the conspiratorial scapegoat prosecution that the FBI

and NYSP sought to expose based on McDonough's complaint and actions.

VI. McDonough Not Implicated in the AB Forgery.

199. In fact, McDonough was not implicated in the AB forgery by any voter, witness, documentary or relevant fact any time prior to December 2012.

VII. McInerney Got Patronage Job After Forging AB Documents for Democrats Including McNally in 2007 Election Won by AB, Threatened to Take Everyone Down if Prosecuted, Got Advice from McNally, Retained McNally's Attorney and Destroyed Evidence on Attorney's Advice.

200. In 2007, Chair Wade gave McInerney the chance to earn a patronage job by working on campaigns after he was fired from the state legislature for telling a female co-worker that she was promoted because she gave their male boss oral sex and a male homosexual coworker witness to it that he was upset because he was not given the same opportunity.

201. Subsequently, McInerney earnestly returned to committing massive AB fraud.

202. That same year, McInerney forged hundreds of AB documents to help Democrats win election, including McNally, Brown and a majority of the candidates for Troy City Council.

203. McInerney and McNally became friends through the 2007 election process.

204. At trial, McInerney testified that Renna was like a father to him and taught him how to commit AB forgery (which, of course, Renna denied).

205. At all relevant times, Renna was known by the named Dem C/O and others as being a longtime wise-guy operative and close associate of McInerney.

206. At all relevant times, DeFiglio was known by the named Dem C/O and others as being a longtime operative and close associate of McInerney.

207. DeFiglio later admitted to Trey Smith that he also assisted McInerney commit AB forgery for Democrats, including McNally and Brown, in the 2007 elections.

208. In January 2008, Chair Wade had McInerney appointed Troy City Clerk by vote of the Troy City Council Democrat majority, including Brown, in reward for his instrumental role he played in getting them and McNally elected in 2007.

209. Thereafter, McInerney committed AB forgery for Democrat candidates in 2008 elections and the subject 2009 WFP primary, with the help of DeFiglio and Renna.

210. Upon information and belief, McInerney told candidates that he committed AB forgery for them before, during and/or after he did it so he could later demand protection from prosecution and/or political favors from them,

211. Thus, on or about September 2009, McInerney openly warned that he would *"take everyone down"* with him if he was prosecuted for the AB forgery.

212. Obviously, McInerney's threat would have concerned only those who participated in his AB forgery or knowingly benefited from it.

213. McInerney admitted at trial that soon after the AB forgery was discovered he drove to McNally's home (about 20 miles) only to ask what attorney he should hire because he did not want to talk on the telephone, but claimed that they did not talk about anything else.

214. McInerney admitted that McNally advised him at that time to retain the attorney who represented him in his 2007 election won by AB, many of which McInerney forged.

215. McInerney admitted that he retained McNally's attorney based on his advice.

216. McInerney admitted that he followed his attorney's advice and threw his cell phone in the river to destroy evidence and evade subpoena in the *Lambertsen* action. Again, McInerney's relevant trial testimony is incorporated herein by reference.

217. Trey Smith knew or should have discovered those facts during his investigation.

218. However, those and many other significant facts which also prove the conspiratorial prosecution were disclosed only after McDonough's indictment because of the actions he took in defending himself that caused Sr. Inv. O'Brien and the FBI to take action that led to the ostensible prosecutions of McInerney, Brown and Renna, as discussed.

219. It is expected that McInerney's cell-phone records, which Trey Smith repeatedly claimed the NYSP could not obtain during his investigation

despite repeated attempts, will show he communicated with McNally and Dem C/O before and/ or during the scapegoat prosecution.

220. It is expected that McNally's public cell-phone records, which he refused to release despite a FOIL request, will show he communicated with McInerney, Trey Smith and Chair Wade before and/or during the scapegoat prosecution.

221. It is expected that Trey Smith's cell-phone records will show that he communicated with McNally before and/or during the scapegoat prosecution.

VIII. Mirch Calls for Federal Investigation and Takes Evidence to U.S. Attorney

222. On September 28, 2009, Mirch held a press conference and called for a federal investigation of the AB forgery because, upon information and belief, he was concerned that McNally would not prosecute McGrath or any other Dem C/O who committed the crimes.

223. At the same time, Mirch also announced that he was taking evidence of the AB forgery to the U.S. Attorney to demand a federal investigation.

IX. Chair Wade Picked McDonough to Take Fall for AB Forgery.

224. Upon information and belief, on or before September 28, 2009, Chair Wade met with some Dem C/O and discussed how the AB forgery should be *"handled."*

225. Chair Wade is a past BOE Commissioner and operative for over 40 years.

226. Upon information and belief, in 2009, he was allied with McGrath, Brown, McNally and McInerney, but not in favor of LoPorto and he thought McDonough was disloyal for voting against his 2006 election.

227. Upon information and belief, in 2009, Chair Wade was concerned about the prosecution of any Dem C/O, especially his key operative whom he had hired as Troy Clerk McInerney, the highly politically-connected, rising-star Troy Councilman Brown and brother of respected jurist, McGrath.

228. Upon information and belief, on or before September 28, 2009, Chair Wade picked McDonough to "take the fall" and be prosecuted for alleged crimes he did not commit to protect the Dem C/O from being prosecuted for the AB forgery they committed.

X. McNally Unlawfully Disqualified His Office and Had Trey Smith Appointed. McNally and Trey Smith Acted Beyond Scope of Legal Authority.

229. Then, on September 28, 2009, the same day that Mirch held a press conference and publicly called for a federal investigation, McNally unilaterally disqualified his office and had Trey Smith appointed to any investigation or prosecution related to the AB forgery by an off-the-record conference in-chambers conference with County Court Judge Robert Jacon and the *Lambertsen* attorney.

230. McNally disqualified himself and assistants from a broad-scoped investigation and prosecution without written motion that established they all had

an impermissible conflict or other lawful basis to be disqualified, in contravention of State law.

231. At some time, an unsigned letter dated September 18, 2009 requesting the appointment of a special prosecutor that McNally purportedly sent to the County Court but not stamped by the county clerk was produced. That letter is incorporated herein by reference,

232. On September 28, 2009, the County Court executed an order stating that *McNally "disqualified himself and his staff"* for acting in the matter pertaining to the investigation of the *Lambertsen* action *"based on the speculation of politics and the appearance of impropriety ..."* That Order is incorporated herein by reference.

233. Consequently, McNally disqualified his office from a broad-scoped investigation of what Trey Smith publicly called "massive voter fraud" and the prosecution of all persons rather than from "a particular case" (i.e. person) as required by N.Y.S. County Law § 701.

234. It is also clear from his purported letter and the court Order that *McNally* did so without showing any actual or substantial likelihood of prejudice to any particular defendant because of a conflict of interest or abuse of confidence, as required by state law.

235. In his letter, McNally asked for the appointment of a special prosecutor "to *avoid the appearance of impropriety"* (i.e. presumably from the investigation or prosecution of fellow Democratic candidates, officials and/or operatives) but did not show any legal basis for his disqualification from the

investigation or prosecution of McInerney, McDonough or any person.

236. Notably, at that time, only McGrath and DeFiglio were identified by name as being involved in the solicitation of AAB. McInerney was not yet named or identified by any voter or witness as being involved in the AB forgery.

237. Later, even with the benefit of hindsight, McNally opposed McDonough's motion to disqualify Trey Smith by asserting that he and his staff were disqualified from the matter based on the affidavits of the voters and Mirch in support of the *Lambertsen* action. McNally's My 7, 2011 affidavit is incorporated herein by reference.

238. In short, McNally therein asserted for the first time that it was his opinion on September 26, 2009 that he was disqualified from investigating or prosecuting any person for any of the subject election crimes because: (a) McInerney had worked on his 2007 campaign; (c) *DeFiglio* had done campaign work with McInerney in the past; (d) he had contact with *James Welch* during his 2007 campaign; and, (b) he believed that Caird worked on his 2007 campaign but did not know whether Aldrich did.

239. Therefore, McNally failed to show any conflict of interest or abuse of confidence that would have actually or likely prejudiced any person by his investigation or prosecution of any matter (although any such retrospective justification still would not have cured the unlawful appointment in 2009).

240. Specifically, he did not establish that he and all his assistants should be disqualified from the prosecution of McDonough or McInerney or any

identified person because it would result in an actual or substantial risk of prejudice to any such person (or defined matter).

241. McNally's unlawful self-disqualification was an essential step in the extra-judicial conspiratorial scapegoat prosecution.

242. It was that act followed by the investigatory suppression of evidence, opposition to the nullification of Trey Smith's unlawful appointment and conspiratorial fabrication of false testimony that allowed for the initiation and continuation of the wrongful prosecution of an innocent person in lieu of those guilty of the election crimes.

243. Later, in an affirmation in opposition to McDonough's motion for disqualification of Trey Smith and/or dismissal of the indictment based on his unlawful appointment, McNally retrospectively claimed that he disqualified himself from the matter because McInerney worked in his 2007 campaign and perhaps Caird and Welch did also, but he did not recall.

244. Thus, McNally asserted after-the-act that he could previously disqualify his office from such a matter prospectively without written motion or specific legal basis because one or more people who worked in some undefined role on his past election campaign might later be implicated or witness to crimes, even though not yet identified as such.

245. As a matter of well-established State law, however, McNally did not establish a legal basis for the disqualification of his entire office from the investigation and prosecution of McGrath, DeFiglio, Brown, McInerney or any person involved in the AB

forgery as required under controlling State law at the time.

246. Specifically, there was no legal or factual basis even asserted for McNally's self-disqualification from an investigation or prosecution of most of the Dem C/O or McDonough.

247. Additionally, McNally did not file a proper written motion for disqualification based on legally sufficient grounds as required by clearly established State law.

248. Therefore, McNally's disqualification was unlawful and all his acts in relation to the investigation and prosecution of McDonough were beyond the scope of legal authority.

249. Similarly, Trey Smith's appointment was a nullity and all his acts in relation to the investigation and prosecution of McDonough were beyond the scope of legal authority.

250. As stated, Trey Smith also acted beyond the scope of legal authority by indicting and prosecuting McDonough for alleged acts that do not constitute the forgery crimes charged.

251. As stated, upon information and belief, McNally unlawfully disqualified his office and had Trey Smith appointed to scapegoat prosecute McDonough and protect McInerney, McGrath, Brown and other Dem C/O from being prosecuted for their AB forgery.

252. Furthermore, McNally did not disqualify his entire office from a pending Grand Jury investigation of allegations made against Chair

Wade who only months before selected him as Democratic candidate for District Attorney.

253. Upon information and belief, McNally did not in 2012 and/or 2013 disqualify his entire office from the prosecution of alcohol-related driving charges against the daughter of Chair Wade from whom he obtained support for nomination as the Democratic candidate for Justice of the Supreme Court in 2013.

254. For all the reasons discussed, those facts are more circumstantial evidence of his alleged misconduct in furtherance of the wrongful prosecution of McDonough.

255. If McInerney had then or previously admitted to McNally that he committed AB forgery and/or threatened to *"take him down"* if prosecuted, McNally was required to disclose those facts to the court and McDonough in support of the disqualification and thereafter.

256. Even still, McNally would not have had any basis for the disqualification of his entire office unless he was expected to be called as a witness because there could not have been any attorney-client relationship or other actual or likelihood of prejudice, regardless of his friendship or past campaign assistance.

257. Upon information and belief, McNally also violated the rules of ethics and N.Y.S. Judiciary Law § 493 by giving legal advice to McInerney, McDonough and Martiniano, talcing physical custody of AB documents and DNA reports related to the case and discussing the matter with Trey Smith subsequent to his unlawful self-disqualification.

258. Upon information and belief, Trey Smith also violated the rules of ethics, various provisions of N.Y.S. and United States law, including N.Y.S. Judiciary Law § 493 and § 487, by among other things: fabricating false testimony to indict and convict McDonough; indirectly giving legal advice to McDonough that was contrary to his interests; depriving McDonough of his right to present a defense; suppressing exculpatory evidence; and aiding McInerney, Brown, McGrath and other Dem C/O in avoiding prosecution for their crimes.

259. Upon information and belief, McNally, Trey Smith and the named defendants also conspiratorially violated 18 U.S. Code § 242 by depriving McDonough of his rights secured and protected by the Constitution or laws of the United States under color of State law.

260. Consequently, Trey Smith is not entitled to absolute or qualified immunity for any of his actions related to the investigation, indictment and prosecution of McDonough

261. Similarly, McNally is not entitled to absolute or qualified immunity for any of his actions related to the investigation, indictment and prosecution of McDonough.

XI. McNally, McInerney, Brown, Chair Wade and Others Spread the Word to Dem C/O that They Should Not Talk Because "It Will All Be Over Soon." Trey Smith Targeted McDonough for Prosecution.

262. The record facts prove that almost immediately after being appointed on September 28, 2009, Trey Smith targeted McDonough for

prosecution without probable cause in lieu of prosecuting the known and identifiable Dem C/O for the AB forgery they committed.

263. However, upon information and belief, Trey Smith had to ensure that there was and would be no federal investigation of the AB forgery before initiating McDonough's scapegoat prosecution because Mirch publicly called for it and brought evidence to the U.S. Attorney's Office on the same day that McNally had him appointed special prosecutor.

264. Therefore, on or about between September 28, 2009 and October 14, 2009, Trey Smith contacted the U.S. Attorney's Office under the pretense of legitimate law enforcement and determined that there would be no federal investigation or prosecution of the 2009 WFP primary AB forgery. See, copy of letters Trey Smith sent to the U.S. Attorney and FBI on April 27, 2011 and April 28, 2011 after he learned about the FBI investigation are attached hereto as *Exhibit A*.

265. Then, on or about October 1, 2009 until July 2011, Chair Wade, McNally, Brown, McInerney, Renna and others told the Dem C/O implicated in the AB forgery that they should not talk to the authorities or worry about the matter because *"it will all be over soon."*

266. Upon information and belief, Trey Smith prior to October 1, 2009 told McInerney and Brown through their attorneys that they would not be prosecuted for the AB forgery.

267. Thereafter, on or about late October and/or early November 2009, Trey Smith leaked to the press

and others that McDonough was a primary target whose prosecution was imminent even though there was no basis to suspect he was involved in the AB forgery.

268. Thereafter, on or about October 2009 and all time relevant thereafter, Trey Smith conspiratorially fabricated false evidence to initiate and continue the prosecution of McDonough and protect the Dem C/O who committed the AB forgery from prosecution.

XII. Hearing Evidence was Sufficient to Lead to Conviction of Brown, McInerney and All Other Guilty Dem C/O.

269. On October 1, 2009, the State court held a hearing in the *Lambertsen* case.

270. Trey Smith attended the hearing and took possession of all the falsified/forged AB documents produced or introduced into evidence.

271. The testimonial and documentary evidence at the hearing implicated McGrath and DeFiglio by name and identifiable Dem C/O by description in the AB forgery.

272. The record of the proceeding which Trey Smith attended confirmed that the AB forgery was committed by the Dem C/O who "worked the streets" to solicit AB.

273. Also, Trey Smith worked with McDonough and other employees of the BOE during that time to gain a firm understanding of the election process, etc.

274. Furthermore, the record facts show that if followed by rudimentary investigation and prosecution tactics that evidence would have led to the discovery of evidence sufficient to convict

McGrath, DeFiglio, McInerney, Brown and all other Dem C/O guilty of the crimes.

A. *Brown Committed Perjury re Daniel AB Documents He Forged.*

275. No Democrat candidate except Brown testified at the hearing.

276. In part, Brown testified that WFP member "David Daniels" was a friend who completed or gave him permission to complete his AB documents that he filed.

277. In truth, Brown and Daniel were not friends and Brown had forged all of the AB documents he filed for him.

278. Brown also forged all the AB documents that he filed for DeFabio, Petit and Tangredi in the Independence Party and Democratic Party primaries.

279. Upon information and belief, LoPorto gave Brown the name of one or more of those persons for the purpose of AB voting.

280. More notably, as stated, Brown filed forged AAB for DeFabio, Petit and Tangredi at the same time on September 14, 2009 that he filed the forged Daniel AAB. Those AAB are incorporated by reference.

281. Thus, Brown committed perjury in a highly publicized case in front of Trey Smith knowing that Daniel, DeFabio, Petit, Tangredi and other witnesses and their forged AB documents were readily available to prove his guilt of AB forgery and perjury.

282. Additionally, Trey Smith took possession of the forged Daniel AB documents, knew Brown was a suspect and knew Daniel was a material witness.

283. It was also a matter of public record and known or should have been known to Trey Smith that Brown was also involved in Democratic and Independence Party primaries.

284. All the AB documents filed in the Troy City Council Democratic and Independent Party primaries were easily obtainable by Trey Smith at all times relevant.

285. Therefore, Trey Smith should have obtained the testimony of Daniel as well as the testimony and forged AB documents of DeFabio, Petit and Tangredi that alone would have been sufficient to convict Brown, but he did not.

B. *Suozzo Testified About AB Documents McInerney Forged.*

286. Brian Suozzo ("Suozzo") testified at the *Lambertsen* hearing that his purported AAB, AB and AB envelope were forged.

287. Suozzo lived a few houses away from McInerney and knew him personally.

288. McInerney enrolled Suozzo in the WFP in 2007.

289. McInerney was named as the AB Agent on Suozzo's forged AAB.

290. Suozzo had no contact with any other Dem C/O about AB voting.

291. McInerney had also forged AAB and AB for Suozzo and many other voters in 2007, 2008 and

2009 elections in his distinctly unique and recognizable handwriting.

292. Trey Smith took possession of the Suozzo forged AB documents.

293. Trey Smith knew that Suozzo was a material witness.

294. Trey Smith knew then or soon thereafter that McInerney was closely associated with Brown, DeFiglio, Renna and other candidates for whom he was active in obtaining AB votes in the subject WFP primary and prior elections, including McNally and Brown.

295. Trey Smith knew that McInerney's physical appearance matched the description son.e voters gave of one of the people who had them execute AAB.

296. At all relevant times, Trey Smith had access to all of the AB documents filed in all of the 2009, 2008 and 2007 primary and general elections in Troy and Rensselaer County.

297. Thus, Trey Smith should have obtained Suozzo's testimony and forged 2008 and 2007 AB documents that alone would have been sufficient to convict McInerney, but he did not.

C. *Mason Testified re AAB that McGrath had Dickenson and Taylor Sign*

298. Mason testified that he saw voters Dickenson and Taylor sign AAB for McGrath.

299. Those voters swore that their AAB were falsely completed and AB forged.

D. *Trey Smith Gave MeNally Custody of the AB Documents, Talked to McNally About AB*

Forgery and Had NYSP DNA Reports Sent to McNally.

300. Trey Smith admitted during McDonough's prosecution that he and McNally talked about the AB forgery after McNally disqualified himself from the matter.

301. Upon information and belief, at or about the time of the *Lambertsen* hearing, Trey Smith took possession of the AB documents and put them into the custody of McNally's office.

302. On or about January 11, 2010, May 19, 2010 and November 2, 2010, the NYSP laboratory sent McNally its DNA reports regarding AB documents at the request of Trey Smith.

303. Upon information and belief, Trey Smith did those things for McNally to review and discuss that evidence with him and/or McInerney and further the scapegoat prosecution.

XIII. McGrath Publicly Proclaimed His Innocence and Called Voters Liars.

304. On or about Oct, 2, 2009, McGrath publicly claimed that he was innocent and effectively called the voters who incriminated him in the AB forgery liars.

305. Specifically, the Times Union reported that: *"[McGrath] disputed the accounts of Taylor and Dickenson that they never filled out [their AB]. He ... retrieved the [AB] ... returnable to Mason ... but ... said there was nothing improper. 'I took those [AAB] to the [BOE], and I did receive the [AB], and with certainty I brought them back to those two individuals and they did absolutely sign those. I am*

a good guy. I did nothing wrong here and I look forward to getting back on the campaign trail'."

306. However, even though McGrath was brazen enough to publicly proclaim his innocence and good moral character in the face of irrefutable voter testimony that directly incriminated him in the AB forgery he did not then take the opportunity to allege that: the AAB he filed must have been falsely completed at the BOE; he once saw McDonough trample on the rights of his *"friend-lies"* by writing false Excuses on the Taylor and Dickenson AAB; and he heard McDonough and Brown talk about names to use as AB Agents on AAB,

307. Instead, like McInerney, Brown, Dan Brown and others involved in the crimes, he got an attorney and refused to talk to the NYSP without immunity, which he soon received.

XIV. Trey Smith Told McInerney He Would Not Be Prosecuted and McInerney Was Not Concerned about Being Prosecuted until Arrested at Direction of Sr. Inv. O'Brien in 2011 without Trey Smith's Prior Knowledge.

308. McInerney forged hundreds of AB documents in 2007, 2008 and 2009 in his normal distinct and identifiable handwriting.

309. Also, at all relevant times, McInerney knew that: (a) Trey Smith was purportedly conducting an extensive investigation with assistance of the NYSP; (b) he forged hundreds of AB in 2007, 2008 and 2009 written in his normal unique handwriting that could be identified; (c) Suozzo and numerous other readily available witnesses and forged documents sufficient to prove his guilt and corroborate the testimony of

any accomplice could easily be obtained through rudimentary investigation; (d) the testimony and forged AB documents of Suozzo alone would have been sufficient to convict him; (e) DeFiglio committed AB forgery in conspiracy with him, agreed to cooperate in October 2009 and disclosed detailed facts to Trey Smith sufficient to prove his guilt on or about October and/or November 2009 and thereafter; (f) McGrath was given immunity to cooperate, had knowledge of facts that could prove his guilt and allegedly disclosed information to Trey Smith in March 2010; (g) McDonough, O'Malley and Brown knew he was given numerous AB for voters on September 14, 2009 that were forged and filed on September 15, 2009; (h) DeFiglio, Brown, McGrath, Dan Brown, LoPorto, Campana, Galuski, Renna and others had knowledge of facts that could prove his guilt; (i) Martiniano had knowledge of facts and admissions that could prove his guilt; (j) Martiniano came forward in February 2011 and could testify about his and Brown's admissions; (k) he and Brown had Renna tamper with DeFiglio to keep him from cooperating further with Trey Smith; and, (1) the matter was widely-reported and witnesses might come forward.

310. Nonetheless, soon after McInerney threatened to take everyone down with him if prosecuted, talked to McNally, hired McNally's attorney, destroyed evidence and avoided legal process, McInerney returned to his usual daily activities without any concern of being prosecuted for the hundreds of readily provable AB forgery crimes he committed in 2007, 2008 and 2009.

311. Upon information and belief, prior to October 1, 2009 and thereafter until on or about June 2011, Trey Smith told McInerney he would not be prosecuted for the AB forgery.

312. In fact, McInerney admitted at trial that Trey Smith told him in 2009, 2010 and 2011 that he would not be prosecuted.

313. McInerney also admitted that he had no concern about being prosecuted for the easily provable AB forgery he committed until he was unexpectedly arrested in July 2011 without Trey Smith's knowledge because of McDonough's actions in defense of his innocence.

314. Again, McInerney made those admissions only because his ostensible prosecution was caused by McDonough's actions and the NYSP independent investigation. McInerney's relevant trial testimony is incorporated herein by reference.

315. Still, McInerney asked McDonough several times in 2009 not to tell the authorities that he delivered the AB released on the falsified/forged AAB that Brown filed on September 12, 2009 to him, at Brown's request, with O'Malley present.

316. Upon information and belief, McInerney did so to set-up McDonough for scapegoat prosecution in furtherance of the alleged conspiracy.

XV. Trey Smith Told Brown He Would Not Be Prosecuted and Brown Was Not Concerned about Being Prosecuted until McInerney was Arrested by NYSP in 2011 without Trey Smith's Prior Knowledge.

317. Again, Brown committed AB forgery and perjury in court in front of Trey Smith.

318. Also, at all relevant times, Brown also knew that: (a) Trey Smith was purportedly conducting an extensive investigation with assistance of the NYSP; (b) he forged numerous AB documents written in his normal handwriting that could be identified; (c) he committed perjury in the *Lambertsen* hearing about the Daniel AB documents that he forged and filed at the same time that he filed the forged AAB for DeFabio, Petit and Tangredi, and the testimony and AB documents of those voters that alone would have been sufficient to convict him could have been easily obtained through rudimentary investigation and prosecution tactics; (d) Daniel and other readily available witnesses and forged documents sufficient to prove his guilt of AB forgery and perjury could easily be obtained through rudimentary investigation; (e) the testimony and forged AB documents of Daniel alone would have been sufficient to convict him; (f) DeFiglio committed AB forgery with McInerney for him, agreed to cooperate in October 2009, had knowledge of facts that could prove his guilt and cooperated in October/November 2009 and thereafter; (g) McGrath was given immunity to cooperate, had knowledge of facts that could prove his guilt and allegedly disclosed information to Trey Smith on or before March 2010; (h) McDonough, O'Malley and McGrath knew he filed numerous AAB on September 14, 2009, gave AB Agent names and Excuses to McDonough and O'Malley to write on AAB he filed for release of AB he asked McDonough to bring to McInerney that were filed on September 15, 2009 by Couch at the

request of LoPorto (all of which of which were falsified or forged); (i) DeFiglio, McGrath, McInerney, O'Malley, LoPorto, Campana, Galuski, Renna and others had knowledge of facts that could prove his guilt; (j) Martiniano had knowledge of facts and admissions that could prove his guilt; (k) Martiniano came forward in February 2011 and could testify about his and McInerney's admissions; (l) his family allegedly set a job up for DeFiglio in Vermont and he and McInerney had Renna tamper with DeFiglio to keep him cooperating with Trey Smith; and, (m) the matter was widely-reported and witnesses might come forward.

319. Nonetheless, soon after Brown prepared a press release for the WFP to falsely accuse Mirch of lying about the AB forgery, falsely testified in court about the Daniel AB documents he forged and suggested to other Dem C/O that McInerney should take a plea so that they would not be prosecuted, Brown returned to his usual activities in 2009 without any concern of being prosecuted even though he knew his crimes were readily provable.

320. Upon information and belief, prior to October 1, 2009 and thereafter until on or about June 2011, Trey Smith told Brown that he would not be prosecuted for the AB forgery.

321. In fact, Brown admitted at trial that Trey Smith told him in 2009, 2010 and 2011 he would not be prosecuted and he had no concern about being prosecuted for the easily provable elections crimes and perjury he committed until McInerney was arrested and evidence of his forgery of the Daniel, DeFabio, Petit and Tangredi AB documents was

obtained without Trey Smith's prior knowledge, because of the NYSP independent investigation. Brown's relevant testimony is incorporated herein by reference.

XVI. Trey Smith Directed and Participated in Investigation to Fabricate False Testimony to Indict and Convict McDonough in Lieu of Guilty Dem C/O.

322. Trey Smith directed and participated in the AB forgery investigation from his appointment on September 28, 2009 until McDonough's trial acquittal on December 21, 2012.

323. On or about October 14, 2009, the NYSP assigned Ogden and other investigators to assist Trey Smith in his investigation.

324. Trey Smith directed and participated in the gathering and analysis of evidence in an investigatory capacity, including the interrogation and questioning of witnesses, purportedly to follow and obtain evidence against those who committed the AB forgery.

325. The record facts prove, however, that Trey Smith directed and participated in the gathering and analysis of evidence in an investigative capacity throughout all stages of the proceedings, including the interrogation of witnesses and purported cooperating witnesses, solely to initiate and continue the scapegoat prosecution, fabricate testimony, protect the guilty Dem C/O from being prosecuted and cover-up their conspiracies.

326. Specifically, Trey Smith directed or participated in the interrogation of all known suspects, material witnesses and purportedly

cooperating Dem C/O during his investigation, including DeFiglio, McDonough, McGrath, Couch, Caird, JWelch, Aldrich, O'Malley, McInerney, Renna, Brown, Campana and Galuski.

327. Upon information and belief, however, as discussed below, Trey Smith directed or participated in the interrogation of witnesses, suspects and Dem C/O to suppress any truthful testimony that would incriminate the Dem C/O or exculpate McDonough and to fabricate false testimony that would incriminate McDonough or corroborate such false testimony.

328. Trey Smith also directed and advised the NYSP laboratory in its use of a "new" method to extract DNA from sealed AB envelopes after many costly failed attempts to obtain McDonough's DNA from numerous AB documents.

329. Trey Smith and/or Ogden also attended the laboratory when his proposed DNA extraction method was used and McDonough's DNA was allegedly found on three (3) AB envelopes, two (2) of which he is certain he never touched, which supported their already debunked preposterous prosecution theory that all the AAB were falsely completed at the BOE. The relevant emails, letters, reports and a photograph of Trey Smith wearing anti-contamination garb are incorporated herein by reference.

330. Ogden admitted at trial that Trey Smith directed and participated in the investigation throughout the case. His relevant testimony is incorporated herein by reference,

331. Trey Smith admitted during argument on a motion concerning the taking of handwriting exemplars that NYSP Investigators Ogden and Fancher had been *"working on [the] case with [him] for two years", "every step of the way"* and that he considered them *"to basically be one entity working together."* The relevant portion of the transcript of that oral application is incorporated herein by reference.

332. On August 3, 2011, after learning that the FBI and supervisory NYSP were conducting an investigation into the scapegoat prosecution and AB forgery without his knowledge, Trey Smith sent a memo to Ogden and Fancher at 5:06 a.m. in which he admitted that he was acting in the capacity and role of an investigator when he said: *"None of this has anything to do with the integrity of our investigation of McDonough."*

333. More significantly, upon information and belief, Sr. Inv. O'Brien will testify that Trey Smith, among many other things: (a) directed and participated in the investigation, interrogation of witnesses and gathering and analyzing of evidence; (b) told the supervisory NYSP in 2009, 2010 and 2011 the blatant lie that McInerney and Brown could not be prosecuted because the evidence was not sufficient to corroborate accomplice testimony; (c) did not have prior knowledge of the NYSP independent investigation done in 2011 that led to the discovery of substantial evidence sufficient to convict McInerney, Brown and Renna; (d) did not have prior knowledge of the arrest of McInerney or imminent arrest of Brown and Renna; (e) interviewed guilty Dem C/O alone after misleading the NYSP or FBI

about the same, including McInerney, Brown and DeFiglio; (f) aided McInerney in preparing the deposition he gave as part of his purported "cooperation" without the presence of the police or FBI, contrary to law enforcement practice and NYSP policy; (g) took action to prevent McInerney, Brown and others from being prosecuted or meaningfully so even after arrested or about to be by the NYSP; (h) essentially quashed a federal investigation into the AB forgery, prior election crimes and the alleged scapegoat prosecution; (i) compelled him to submit to an interrogation after Ogden indirectly caused false allegations of leaking NYSP evidence to be made against him, but then asked only about the FBI investigation of McDonough's scapegoat prosecution, whether he was a target of the FBI investigation and whether the FBI had had audio surveillance in his office or telephones; and (j) made false statements to the state court about relevant matters.

334. The fact that Trey Smith acted in an investigative capacity in gathering and analyzing evidence throughout the scapegoat prosecution of McDonough is also proven by certain memoranda, emails, depositions and other records maintained by the NYSP and/or Trey Smith concerning the matter. Those relevant documents are incorporated herein by reference.

XVII. Trey Smith Had Sufficient Evidence to Convict McGrath, DeFiglio and McInerney and All Other Guilty Dem C/O in 2009.

335. Through his investigation, Trey Smith and the NYSP (hereinafter referred to individually and/or collectively as "Trey Smith", unless specifically

delineated) gathered sufficient evidence by November 2009 to convict McGrath, DeFiglio and McInerney.

336. In regard to McInerney, the NYSP obtained the forged AB documents and testimony of more than Fifty (50) witnesses, including Suozzo whom they discovered was one of many voters McInerney had sign registration cards and/ or AAB to forge their AB documents. Those forged AAB and voter depositions are incorporated herein by reference,

337. In sum, that evidence confirmed the testimonial evidence gathered by the private investigation and irrefutably proved that all of the elections crimes were committed on the streets by McGrath, Brown, McInerney, DeFiglio and other identifiable Dem C/O.

338. That evidence was also sufficient to prove that McGrath, Brown, McInerney and DeFiglio committed the AB forgery in conspiracy with other identifiable Dem C/O.

339. Notably, all the Dem C/O involved in having voters sign AAB in September 2009 and others knew that McGrath, Brown and McInerney were the three chief culprits in the crimes.

340. All those Dem C/O also knew that Brown was closely associated with McInerney and McInerney was closely associated with DeFiglio and Renna in obtaining AB for candidates.

341. The evidence also showed the motives for the most culpable Dem C/O for the AB forgery, i.e. Brown sought to garner more votes than others to win the Council presidency; Dan Brown was Brown's brother and *de facto* campaign manager; McInerney

was Brown's most active supporter; DeFiglio and Renna were McInerney's main assistant operatives; and, McGrath was in several primaries, supported Brown and, most significantly, had openly bragged that he was going to *"beat Mirch at his own game"* and *"bring the WFP back to its members."*

342. The record facts also prove that if Trey Smith followed that evidence he would have easily and relatively quickly obtained other evidence sufficient to convict all other Dem C/O who committed the AB forgery as well as McInerney for hundreds of AB forgery and election crimes he committed in 2007 and 2008, especially if he required McGrath to provide truthful information as dictated by their purported "cooperation" agreements, but he did not.

343. Nonetheless, the record facts also prove that instead of following the evidence, Trey Smith immediately targeted McDonough for prosecution without probable cause.

344. No voter, document or fact implicated McDonough in any criminal conduct.

345. Therefore, to initiate and continue the scapegoat prosecution Trey Smith then, among many things; pretentiously adopted and pursued a preposterous prosecution theory he knew was wrong; buried crucial testimony of DeFiglio and other witnesses; did not seek readily available evidence or the truthful cooperation of any perpetrator; accepted the self-serving incredible false assertions of many suspects implicated in the crimes; immunized or gave extraordinarily favorable cooperation agreements to many suspects implicated in the

crimes; purposely ignored material evidence; and fabricated false evidence against McDonough.

346. The record facts prove that in doing so, Trey Smith purposely took a simple case of readily provable serious AB forgery that could have been successfully prosecuted at relatively minor expense and transformed it into one of the most shameful, incredibly convoluted, farcical and costly investigations and prosecutions of an innocent person for the noncriminal act of entering data on authenticated AAB.

347. The record facts prove Trey Smith did so in conspiracy with all other defendants.

348. Specifically, the record facts prove that Trey Smith: fabricated false testimony that he intended to and did present before a Grand Jury and trial juries to prosecute and convict McDonough; ignored, failed to obtain or effectively buried testimonial and documentary evidence that was and would have been sufficient to convict the guilty Dem C/O and prevented McDonough's scapegoat prosecution; give Dem C/O and others immunity, promises of no prosecution and extraordinarily favorable treatment to not tell the truth because it would have led to the conviction of the guilty Dem C/ O and prevented McDonough's scapegoat prosecution; took action to cover-up the nature and extent of the AB forgery committed and enable those crimes to be committed in the future by Dem C/O as they had been for decades; and took action to protect the guilty Dem C/O from any meaningful prosecution throughout.

349. The record facts prove that Trey Smith and Ogden purposely ignored and failed to obtain readily

available evidence that would have been sufficient to convict McGrath, Brown and McInerney, prevented the scapegoat prosecution and likely led to the discovery of other evidence sufficient to convict all the guilty Dem C/O, including the testimony of DeFiglio, Daniel, DeFabio, Petit, Tangredi, Suozzo, Martiniano and Renna.

350. The record facts show that Trey Smith could not suppress all of the overwhelming evidence against McInerney, Brown, DeFiglio, Renna and others or prosecute McDonough for the crimes they committed so he simply ignored it, told supervisory NYSP that they could not be prosecuted and boldly embarked on the fabrication and suppression of evidence to scapegoat prosecute McDonough for falsely alleged acts that are not even crimes as a matter of law.

351. The audacity of the actions of the defendants also proves their conspiracy.

XVIII. Trey Smith Did Not Obtain or Ignored Evidence of Dem C/O Guilt, Targeted McDonough for Prosecution and Sought McDonough's Incrimination.

352. The conduct of Trey Smith, Ogden, McNally and others throughout the case is direct and circumstantial evidence of the scapegoat prosecution, especially when the actions Trey Smith took to not prosecute any Dem C/O for the AB forgery that substantial irrefutable evidence proved they committed is juxtaposed with actions he took to prosecute McDonough for the non-criminal acts he did not commit, as proven by the record facts,

including his own voluminous, memos, e-mails and records.

353. The rub is self-evident: If Smith properly investigated and prosecuted the matter, all the Dem C/O would have been convicted and McDonough would not have been indicted.

354. Therefore, Trey Smith purposely did not obtain evidence and feigned mistake, ignorance or lack of for not doing so.

355. Trey Smith did not prosecute any Dem C/O until forced by action of McDonough, supervisory NYSP and FBI to ostensibly prosecute them and then he did not do so meaningfully.

356. Trey Smith never prosecuted any Dem C/O for the irrefutable perjury they all blatantly committed, especially Brown, McGrath, O'Malley, McInerney and Renna.

357. Trey Smith never prosecuted any of the Dem C/O for their conspiracy to commit the AB forgery (as alleged in Ogden's DNA application) and none of the Dem C/O would admit they acted in conspiracy even after their ostensible prosecutions were forced by McDonough, except Brown who finally did at trial, but only to recant it the next morning.

358. The reason is obvious: If Trey Smith pursued conspiracy charges or any Dem C/O admitted it, all the guilty Dem C/O would have been convicted and McDonough exonerated.

359. Also, if any of the Dem C/O admitted their conspiracy, even after ostensibly prosecuted or given immunity, their political careers would be over, but more importantly, it would have been an admission

of the conspiratorial prosecution for which they would be liable.

360. In any case, all the Dem C/O admitted that McDonough did not act in conspiracy with them to commit the AB forgery.

361. The record facts also prove that Trey Smith and Ogden did not act reasonably in the investigation and prosecution of McDonough, especially in their failure to ask Suozzo, DeFiglio, McGrath, McInerney, Renna, McDonough and other key witnesses basic questions or interview Renna, Martiniano, Daniel, DeFabio, Petit, Tangredi and others, when doing so would have led to the conviction of McGrath, Brown and McInerney and exoneration of McDonough.

362. To the contrary, the record facts prove that Trey Smith and Ogden took action so McGrath, McInerney, Brown, O'Malley, Robillard and others would *not* talk and/or tell the truth.

363. Trey Smith also ignored and did not obtain readily available evidence sufficient to convict McGrath, Brown, McInerney and others throughout his investigation.

A. *McInerney Not Identified Because Voters Showed 20-Year-Old Photograph.*

364. Trey Smith had the NYSP show voters a 20-year-old "mugshot" of McInerney that did not even grossly accurately depict his facial or physical appearance in September 2009. That photograph used for identification purposes is incorporated herein by reference.

365. Therefore, McInerney was never identified by the voters.

B. *Brown, Dan Brown or Others Not Identified No Photographs Shown to Voters.*

366. Trey Smith never showed any voter a photograph of Brown, Dan Brown or other Dem C/O known to have been involved in the solicitation of AAB.

367. Therefore, those Dem C/O were never identified by the voters.

C. *Trey Smith Did Not Obtain Testimony and Forged AB Documents of Daniel, DeFabio, Petit and Tangredi that Would Have Convicted Brown.*

368. The NYSP questioned every WFP voter for whom a relevant AB was filed except David Daniel although Brown testified falsely about his forged AB documents in *Lambertsen.*

369. Daniel was the only one of about fifty (50) WFP voters never questioned

370. Trey Smith never questioned DeFabio, Petit or Tangredi or obtained their AB that Brown forged and filed at the same time as the forged Daniel AB documents.

371. The irrefutable testimony and forged AB documents of Daniel, DeFabio, Petit and Tangredi was readily available and alone would have been sufficient to convict Brown.

372. Therefore, Trey Smith should have obtained and followed the testimony and forged AB documents of Daniel, DeFabio, Petit and Tangredi in his investigation, but he did not,

373. Additionally, if Brown was prosecuted and his truthful cooperation required, he would have disclosed other evidence sufficient to convict all the guilty Dem C/O.

374. Thus, it is clear that Trey Smith purposely did not obtain that evidence.

375. The NYSP easily obtained that evidence (except the testimony of decedent Daniel) when Sr. Inv. O'Brien directed an independent investigation in 2011 and forced Trey Smith to at least ostensibly prosecute Brown.

D. *Trey Smith Did Not Obtain Suozzo's Testimony and Past Forged AB Documents That Would Have Convicted McInerney.*

376. As stated, even though Suozzo was questioned during Trey Smith's investigation, he was not asked basic questions that would have elicited his testimony that alone would have been sufficient to convict McInerney for forging his AB documents in 2007, 2008 and 2009. Copies of Suozzo's November 2009 deposition (obtained at the direction of Trey Smith) and June 2011 depositions (obtained at the direction of supervisory NYSP without Trey Smith's prior knowledge), are attached as *Exhibit B* and incorporated herein by reference.

377. For example, Suozzo was not asked about McInerney, whether anyone enrolled him in the WFP or whether anyone asked him about AB voting (McInerney had) even though the NYSP asked about his registration card and 2009 AAB.

378. Suozzo was the only WFP voter not asked such basic questions when interviewed.

379. Trey Smith also failed to discover or record that Suozzo's 2007, 2008 and 2009 AB documents were forged in the same handwriting; i.e. McInerney's.

380. Suozzo's irrefutable testimony and forged AB documents were readily available.

381. In fact, as discussed below, Trey Smith specifically ignored evidence of McInerney's 2008 and 2007 AB forgery when Bugbee provided it to him in 2010 and again when McDonough did so in 2011.

382. As discussed below, the NYSP easily obtained the testimony and forged AB documents of Suozzo and about fifty (50) other voters that was sufficient to convict McInerney for hundreds of AB forgeries and other crimes he committed in 2009, 2008 and 2007 when Sr. Inv. O'Brien directed an independent investigation in 2011.

383. Therefore, Trey Smith should have obtained and followed Suozzo's testimony and forged AB documents that would have been sufficient to convict McInerney, but he did not.

384. Trey Smith also should have obtained and followed the testimony and forged AB documents of those many other voters for whom McInerney forged AB documents in 2009, 2008 and 2007 that would have been sufficient to convict McInerney, but he did not.

385. Additionally, if McInerney was prosecuted and his truthful cooperation required, he would have disclosed other evidence sufficient to convict all the guilty Dem C/O.

386. The fact that Trey Smith should have obtained evidence sufficient to convict McInerney from Suozzo and many other voters prior to November 2009 cannot be contested.

387. All Trey Smith had to do was to have asked Suozzo one simple question: Did you ever talk with anyone about registering in the WFP or voting by AB?

388. Thus, it is clear that Trey Smith purposely did not obtain that evidence because he did not want to convict McInerney or other Dem C/O who committed the AB forgery.

389. It is also clear that Trey Smith did not believe his own prosecution theory because, if he did, the NYSP investigators would have asked Suozzo such basic questions to obtain his testimony that would have convicted McInerney.

390. However, Suozzo's scant November 2009 deposition is further proof of the scapegoat prosecution because the obvious intended false implication of the absence of those facts is that he had no contact with any Dem C/O and, therefore, his AB documents must have been forged in the BOE, To support the scapegoat prosecution

391. In fact, however, McInerney enrolled Suozzo in the WFP, talked with him about AB voting and forged his AB documents in 2009, 2008 and 2007.

392. If Trey Smith had no knowledge about McInerney's past dealings with Suozzo or truly believed McDonough forged AB documents in the BOE, he would have asked Suozzo and all other witnesses such basic questions, but he did not.

393. In any event, Trey Smith knew that: Suozzo lived in a private residence near McInerney; McInerney was prolific at obtaining AB; Suozzo had no contact with any other Dem C/O who solicited AAB on September 12, 2009; McInerney was AB Agent on Suozzo's forged AAB; and Suozzo's AB was forged.

394. Also, DeFiglio told Trey Smith on or about October 2009 that McInerney and Brown committed the AB forgery.

395. Still, Trey Smith never asked Suozzo such simple questions about McInerney.

396. Thus, his failure to do so shows he must have known it would have led to evidence sufficient to convict McInerney, debunked the prosecution theory and prevented McDonough's scapegoat prosecution,

397. Therefore, the only reasonable inference is that Trey Smith knew from the conspiracy, likely through McNally, that it would have led to the conviction of McInerney for hundreds of AB document forgeries in 2009, 2008 and 2007, the conviction of all the other Dem C/O that committed the 2009 AB forgery and the exoneration of McDonough.

398. Moreover, McInerney has very distinctive handwriting and his unmasked print was on hundreds of AB documents filed in numerous 2007 and 2008 elections.

399. Also, Bugbee, DeFiglio and others told Trey Smith in 2009 and 2010 that it was obvious from the 2009 AB documents and primary role McInerney played in obtaining AB votes in 2007 and 2008, that McInerney committed the AB forgery.

400. Still, Trey Smith did not inspect or have those AB documents examined by a handwriting expert at anytime.

401. To the contrary, as stated below, when Bugbee and McDonough disclosed some of those AB documents to Trey Smith in 2010 and 2011 as evidence of McInerney's forgery of 2009 AB documents, he rejected that evidence out of hand.

402. However, when McDonough provided those same AB documents to supervisory NYSP in 2011 it led to the discovery of overwhelming evidence sufficient to convict McInerney for hundreds of AB document forgeries he committed in 2007, 2008 and 2009.

403. It is not plausible that Trey Smith failed to obtain that evidence other than intentionally because he needed only to have inspected the AB documents, asked Suozzo and other voters if they had contact with anyone about enrolling in the WFP or AB voting, ask DeFiglio and other Dem C/O involved in the solicitation of AAB on Sept. 12, 2009 basic questions about McInerney, had the Suozzo and other AB documents examined by a FBI or police Forensic Document Examiner ("FDE") or otherwise conducted a proper investigation.

404. Of course, if McInerney was meaningfully prosecuted he likely would have fully cooperated against all his cohorts, as warned.

405. There is no other plausible explanation for the actions of Trey Smith and Ogden but the conspiratorial scapegoat prosecution, especially because they consistently failed to obtain or ignored evidence from voters, witnesses and cooperating

defendants that would have been sufficient to convict all the guilty Dem C/O throughout the case.

406. They also consistently sought to have BOE employees, WFP operatives and Dem C/O incriminate McDonough by asking questions about whether he was involved in the AB forgery at the same time that they did *not* ask them basic questions about McInerney, Brown and others that would have led to his exoneration and the conviction of the guilty Dem C/O.

407. The consistent failure of Trey Smith to obtain readily available irrefutable evidence sufficient to convict McGrath, McInerney, Brown and the other guilty Dem C/O itself proves the conspiratorial prosecution, i.e. he knew from the relationships between himself, McGrath, Brown, McInerney, McInerney's attorney, McNally and/or others that if McDonough, Suozzo, DeFiglio, O'Malley, Renna, Martiniano, Daniel, DeFabio, Petit or Tangredi were properly questioned they would have disclosed evidence that would have convicted the guilty Dem C/O and prevented the scapegoat prosecution of McDonough.

408. The same is true concerning Trey Smith's obvious failure to require DeFiglio, McGrath, O'Malley, McInerney, Brown or Renna to provide complete truthful information as required by their purported Cooperation Agreements, as discussed.

E. *Couch, Caird and JWelch Got Attorneys and Refused to Talk Without Immunity. Trey Smith Gave Couch, Caird and JWelch Immunity and Sought Incrimination of McDonough Although*

No Reason to Suspect He was Involved in Crimes

409. JWelch and Caird, who gave Brown permission to falsely name them as AB Agents on AAB, retained attorneys and refused to talk with Trey Smith without immunity.

410. Couch, who filed AB that McInerney forged at the request of LoPorto, retained an attorney and refused to talk with Trey Smith without immunity.

411. On or about October and November 2009, Trey Smith gave Couch and Caird promises of non-prosecution in return only for their purported truthful testimony.

412. Couch and Caird gave the NYSP a sworn written deposition on October 22, 2009 and November 4, 2009, respectively. Their depositions are incorporated herein by reference.

413. Coach and Caird denied committing the AB forgery or any crimes.

414. Upon information and belief, Trey Smith on one or more occasions interviewed Couch and Caird and sought to have them incriminate McDonough in the AB forgery,

415. It is also clear from their depositions that Trey Smith sought any incrimination of McDonough possible but Couch and Caird could not do so truthfully and did not to do so falsely.

416. Still, the innocuous comments McDonough made at LoPorto's Restaurant were recorded in their depositions for the false implication of incrimination, as stated above.

417. On or about December 6, 2010, Trey Smith gave JWelch immunity in return only for his purported truthful testimony pursuant to an executed cooperation agreement.

418. JWelch denied committing the AB forgery or any crimes.

419. Trey Smith did not obtain a sworn written deposition from JWelch.

420. Upon information and belief, Trey Smith did not obtain a written deposition from JWelch because he could only have incriminated Brown.

421. Otherwise, the WFP operatives directly incriminated only Brown and LoPorto.

422. In their depositions, Couch and Caird admitted that on September 14, 2009, Brown asked for permission to falsely write their names as AB Agent on AAB and they agreed.

423. In her deposition, Couch also admitted that LoPorto handed her a newspaper folded over AB and asked her to file them but forget she got them from him. She stated LoPorto did not tell her that the AB were forged but acted furtively about the matter.

424. Couch admitted that she delivered AB to the BOE on September 15, 2009 at LoPorto's request, but again claimed that she did not know they were forged.

425. Couch and Caird also admitted that at LoPorto's Restaurant on or about September 24, 2009, Brown and Dan Brown asked them to issue a Press Release accusing Mirch of making false claims of voter fraud, Brown acted nervous and guilty and Brown said *"they were there," "it was not as bad as it*

appeared " when confronted about the AB forgery by Couch and McDonough.

426. JWelch testified at trial generally consistently with the above facts.

427. Trey Smith accepted the denials of guilt from the WFP operatives without properly questioning them and obtaining all their truthful knowledge about the AB fraud.

F. *Brown, Dan Brown, McInerney, LoPorto, Campana, Galuski and Aldrich Got Attorneys and Refused to Talk Without Immunity.*

428. McGrath, Brown, Dan Brown, McInerney, LoPorto, Galuski, Campana and Aldrich who were implicated in the AB forgery or material witnesses to the crimes, retained attorneys and refused to talk to Trey Smith or NYSP without immunity.

G. *Trey Smith Did Not Give Brown, Dan Brown and McInerney Immunity. Their Testimony Would Have Had to be Truthful and Convict Guilty Dem C/O.*

429. Upon information and belief, Trey Smith could not give Brown, Dan Brown or McInerney immunity because given the known and easily discoverable evidence, they would have had to give substantially truthful testimony that would have convicted the guilty Dem C/O and prevented the scapegoat prosecution of McDonough.

430. Instead, Trey Smith: (a) made them targets so they could assert their right to remain silent; (b) told Brown and McInerney that they would not be prosecuted; and (c) told the supervisory NYSP the blatant lie that they could not be prosecuted because

their was insufficient evidence to corroborate any accomplice testimony, including that of any voter deemed to be complicit in the crimes as a matter of law, as discussed herein.

431. Upon information and belief, Trey Smith also told Dan Brown in 2009, 2010 and 2011 that he would not be prosecuted and he was not seen as a primary target by anyone.

H. *Trey Smith Gave Aldrich Promise of No Prosecution and Sought Incrimination of McDonough Alhough No Reason to Suspect He was Involved in Crimes.*

432. Aldrich, a close associate of LoPorto who assisted McInerney and Dan Brown in getting voters to sign AAB on September 12, 2009 and was named the AB Agent on nineteen (19) falsified or forged AAB for which AB were forged by AB McInerney and filed by Couch at LoPorto's request, retained an attorney and refused to talk to Trey Smith without immunity.

433. On or prior to November 13, 2009, Trey Smith gave Aldrich a promise of non-prosecution in return only for his purported truthful testimony.

434. On November 13, 2009, Aldrich gave the NYSP a sworn written deposition. His deposition is incorporated herein by reference.

435. Aldrich denied committing the AB forgery or any crimes.

436. Trey Smith accepted Aldrich's denial of guilt without properly questioning him and obtaining all of his truthful knowledge about the AB fraud.

437. Upon information and belief, Trey Smith on one or more occasions interviewed Aldrich and sought to have him incriminate McDonough in the AB forgery.

438. It is also clear from his deposition that Trey Smith sought any incrimination of McDonough possible, but Aldrich could not do so truthfully and did not to do so falsely.

I. *LoPorto, Galuski and Campana Refused to Falsely Incriminate McDonough.*

439. Upon information and belief, on occasions on or about October or November 2009 and thereafter, Trey Smith sought to have LoPorto, Galuski and Campana incriminate McDonough for immunity but they could not do so truthfully and did not to do so falsely.

440. Upon information and belief, Trey Smith considered LoPorto, Galuski and Campana to have played minor, if any, culpable roles in the AB forgery.

441. Upon information and belief, Trey Smith intended to scapegoat prosecute LoPorto if he could not coerce McDonough into pleading guilty before indictment because he made clear his intent to defend his innocence and expose the scapegoat prosecution if indicted.

J. *Leonard and Mason Refused to Gave Written Depositions*

442. Richard Mason, friend and campaign helper of McGrath, refused to talk to the NYSP about the matter even though he testified at *Lambertson* hearing.

443. Michael Leonard, a relative and campaign helper of McGrath, told the NYSP he knew nothing about the AB forgery and refused or was not asked to give a deposition.

444. Trey Smith accepted Leonard's word without questioning him about the AB documents he filed in 2009 and past years (for the same voters and/or with similar Excuses) or taking a written statement from him.

K. *Donald Cunningham, Louis Schneider and Sought Incrimination of McDonough Although No Reason to Suspect He was Involved in Crimes.*

445. City Employees Donald Cunningham and Louis Schneider were interviewed by NYSP and gave sworn written depositions on November 24, 2009. Their depositions are incorporated herein by reference.

446. The NYSP questioned those two men about McDonough to obtain any evidence that might incriminate him, specifically with respect to any dealings with McInerney.

L. *Trey Smith Asked BOE Employees about McDonough and AB Process. Trey Smith Sought Incrimination of McDonough Although No Reason to Suspect He was Involved in Crimes.*

447. On or about November 10, 2009, Trey Smith interviewed most BOE employees.

448. All BOE employees were interviewed at the BOE, except McDonough.

449. Trey Smith did not give *Miranda* warnings to any BOE employee or take the sworn deposition of any BOE employee, except McDonough.

450. Upon information and belief, Trey Smith did not take depositions of the other BOE employees so O'Malley did not have to give a sworn statement because: O'Malley already got the word and joined the conspiracy to prosecute McDonough; O'Malley would give fabricated false testimony against McDonough only if needed because he was nervous by nature; and O'Malley's role at the time was to not disclose the truth that would directly incriminate McInerney, Brown and McGrath in the AB forgery and be sufficient to convict Brown for his perjury before the State court and Brown and McGrath later for perjury before the Grand Jury.

451. Upon information and belief, Trey Smith purposely did not take a deposition from any BOE employee except McDonough because it would have required O'Malley to give a false statement in furtherance of the conspiratorial prosecution and exposed the scheme at that time.

452. The record facts prove that O'Malley's role at that time was to not talk prior to Grand Jury, but give fabricated false testimony as needed at Grand Jury and trial to initiate and continue the scapegoat prosecution.

453. All of the BOE employees denied any knowledge of the AB forgery.

454. Commissioner Bugbee and other employees of the BOE told Trey Smith that it was lawful BOE practice to: (a) assist voters and their agents by writing data that the voters gave onto AAB so it

could be filed; and (b) release AB to voters, voters' agents or persons designated by a voter or a voter's agent if an AB Agent is named on an AAB, even if not the AB Agent.

M. *O'Malley Did Not Tell the Truth That Would Have Incriminated Brown and McInerney But Did Not Falsely Incriminate McDonough in 2009.*

455. O'Malley was also a political operative with strong allegiance to Chair Wade known to have solicited AB in his town on behalf of Democrats (although on a smaller scale than *McInerney)* and was appointed to his BOE position by Chair Wade.

456. It was discovered by McDonough during the defense of the scapegoat prosecution that O'Malley had filed AAB for certain voters from the Town of Hoosick over the years, including an unusually high number in 2009 who had the same excuse of being *"home recovering from a stroke"* for the same election.

457. O'Malley was a member of the Town Board when Trey Smith was appointed its attorney through the efforts of a mutual friend and past political associate. He also had direct and indirect association with McNally and McInerney.

458. When questioned by Trey Smith and/or Ogden in 2009 or 2010 he did not disclose those facts that would have directly incriminated Brown and McGrath

459. Significantly, when O'Malley was questioned by Trey Smith in the fall of 2009, he did not disclose the truth about what happened on September 14, 2009; i.e. he sat across a desk from Brown in McDonough's office and wrote Excuses on eight (8)

AAB that Brown said voters gave while McDonough helped McGrath; and, later that day was with McDonough when he delivered all the AB released on the AAB Brown filed which were forged and then filed the next day by Couch for LoPorto.

460. Also, O'Malley did not at that time falsely claim that he heard McDonough tell McInerney that he *"had two HVCC students"* who *"owed him a favor"*, as he did later.

461. O'Malley did not at that time falsely report that McDonough called him into his office and made him write false Excuses on AAB when no one else was present, as he did later.

462. The fact that O'Malley remained silent instead of then disclosing the truth that would have incriminated Brown and McInerney or made false allegations to incriminate McDonough, as well as the key role he later played in falsely testifying in the Grand Jury and trials, proves that he joined the conspiracy to initiate and continue the scapegoat prosecution at its inception or soon thereafter, as do his other acts and testimony, as discussed,

463. O'Malley did not give a deposition or confirm what happened in McDonough's office on September 14, 2009 when questioned again by Ogden in December 2009, specifically about walking to McInerney's office with McDonough.

464. Furthermore, O'Malley admitted at trial that on December 16, 2009 he lied to Ogden about what happened when McDonough gave McInerney the AB released on the AAB Brown filed on September 14, 2009.

465. Even after McDonough told Ogden that O'Malley was with him when he gave McInerney the AB released on the AAB Brown filed on September 4, 2009, O'Malley did not give a written statement when he falsely told Ogden on that date that he *"did recall walking with McDonough to the City Clerk's office ... could not be any more specific ...he waited in the lobby and could not remember if McDonough had an envelope with him."*

466. Trey Smith never asked O'Malley about what happened in McDonough's office on that date or about AAB or the actions of Brown or McGrath concerning the filing of AAB.

467. O'Malley allegedly told Trey Smith and the NYSP several times in 2009 that he did not have any knowledge about the AB forgery.

468. At trial, Trey Smith asserted that O'Malley declined to give a written statement.

469. In any event, O'Malley was a key participant in the scapegoat prosecution because he did not at anytime tell the simple truth about what happened on Sept 14, 2009 that would have proven Brown's crimes and perjury, proven McGrath's false accusations and perjury and prevented the scapegoat prosecution but later testified falsely to protect McInerney, Brown and McGrath and initiate the scapegoat prosecution against McDonough.

470. Instead, O'Malley lied about everything and falsely accused McDonough so that he did *not* incriminate Brown or McGrath.

471. Later, O'Malley also unilaterally destroyed AAB and AB filed in 2007 elections after McDonough and Bugbee began to discover and disclose those that

McInerney and Renna forged in past elections to the FBI and supervisory NYSP as evidence of their 2009 crimes. A June 10, 2011 email from Trey Smith to O'Malley's attorney in which he adds: *"of course, this could fail into a known pattern of doing as he is told", is* incorporated herein by reference

N. *McDonough Twice Questioned at NYSP Station After Miranda Warnings.*

472. In contrast, Trey Smith had Ogden interview McDonough twice at the NYSP station, gave him *Miranda* warnings and took a sworn written deposition on both occasions, i.e. November 19, 2009 and December 7, 2009.

473. Ogden directed the interviews and asked him about McInerney, focused his questioning on forged AB and McDonough's delivery of AB to McInerney on September 14, 2009 but did not ask him anything about AAB or the filing of AAB by McGrath, Brown, McInerney, DeFiglio or Renna or the AAB Brown filed on Sept. 14, 2009; or, the completion of AAB for McGrath, Brown or any other voter agent.

474. He was cooperative and gave two written depositions.

475. McDonough disclosed that on September 14, 2009 he took the AB issued on the AAB Brown filed that day to McInerney at Brown's request and O'Malley accompanied him.

476. McInerney asked McDonough several times in the fall of 2009 not to talk to the NYSP or tell them that he got the AB released on the AAB Brown filed on September 14, 2009.

477. At the same time, Chair Wade told McDonough that he should get an attorney and not talk to the NYSP.

478. Nonetheless, McDonough remained a cooperative witness, would have testified truthfully if called as a witness and was not dissuaded from talking to the NYSP.

479. At trial, O'Malley testified that he is a nervous person afraid of his own shadow.

480. Therefore, it is also obvious by his conduct alone that he participated in the conspiracy from the inception or soon thereafter and throughout the prosecution, as discussed.

O. *Martiniano and Renna Were Not Interviewed. Their Testimony Would Have Led to Conviction of McInerney, Brown and Likely All Guilty Dem C/O.*

481. Trey Smith and Ogden knew that Martiniano was involved in the AB forgery or a material witness and close associate of LoPorto, but not a supporter of McInerney or Brown.

482. Trey Smith knew that Renna was a longtime operative, close associate of McInerney and involved in the AB forgery or material witnesses to the crimes.

483. Of course, McInerney and Brown knew that Martiniano and Renna had personal knowledge of facts that could directly incriminate them in the subject crimes and that they would likely be arrested and/or prosecuted if either one talked to the NYSP.

485. Additionally, Martiniano would have provided testimony about the admissions Brown and

McInerney made to him that would have prevented the scapegoat prosecution.

486. However, Trey Smith did not interview Martiniano or Renna in 2009 or 2010.

487. Martiniano and Renna were the only Dem C/O involved in the effort to obtain signed AAB that were not questioned by Trey Smith or the NYSP during his investigation.

P. *Trey Smith Ignored Forged AAB Bugbee Provided that Alone Was Sufficient to Lead to the Conviction of McInerney for AB forgery in 2009, 2008 and 2007.*

488. In 2009, Bugbee and BOE employees Mary Sweeney and Bonnie Bec[illegible] told Trey Smith and/or Ogden that there was no reason to believe McDonough forged any AB document and, in response, he implied that they were acting in complicity with him.

489. In 2009, Bugbee and other BOE employees told Trey Smith and/or Ogden that it was lawful BOE practice to: (1) assist voters/agents by writing data voters gave onto AAB so it could be filed; and (2) release AB to voters/agents, even if not an AB Agent.

490. In 2009 and/or 2010, Bugbee told Trey Smith and/or Ogden that it was obvious from the 2009 forged AB documents and voter statements that McGrath, McInerney and other Dem C/O committed the crimes.

491. On or about November 15, 2010, in response to a voter's complaint of forgery and illegal voting at the polls in 2009, Bugbee discovered and provided to *Trey Smith* and the NYSP about twenty (20) AAB

filed in 2007 and 2008 elections that appeared to have been forged in the same unique handwriting, which he told them he then knew to be McInerney's print. Those 2007 and 2008 AAB are incorporated herein by reference.

492. The BOE records showed that it was actually her voter registration card and 2007/2008 AAB that were forged.

493. At the time, Bugbee told Trey Smith that the unique handwriting on the AAB was that of McInerney (*"its Mac"*), and requested proper criminal action.

494. Upon information and belief, Trey Smith told Bugbee that the NYSP were not interested in the matter and he had no authority to prosecute any past election crimes.

495. Thus, he avoided obtaining that evidence of McInerney's past AB forgery relevant to the 2009 AB forgery that would have led to McDonough's exoneration. I

496. If followed, that evidence would have led to voter testimony sufficient to convict McInerney for AB forgery he committed in 2007, 2008 and 2009.

497. In fact, those documents showed that McInerney also filed AAB for the same voters in more than one year; i.e. he had a so-called "stable" of voters for whom he forged AB.

498. Trey Smith and Ogden ignored that evidence and did not obtain the testimony of any of those voters that would have led to McInerney's conviction.

499. Later in 2010, McDonough gave Trey Smith those and/or other 2007 and 2008 AAB that appeared

to have been partially or entirely written in the handwriting of McInerney or Renna also as additional proof of his AB forgery in 2009. Those 2007 and 2008 AAB, which McDonough also later provided to the supervisory NYSP, are incorporated herein by reference.

500. Trey Smith and Ogden again ignored those past AB documents that would have led to the discovery of overwhelming evidence sufficient to convict McInerney for AB forgery he committed in 2007, 2008 and 2009 on the basis that he had no authority to pursue those crimes and the NYSP were "not interested" in the evidence.

501. Those documents as well as the testimony of voters to prove McInerney's guilt in 2009 and past years could have been easily obtained by rudimentary investigation.

502. Trey Smith also could have had the scope of his purported authority perfunctorily expanded as he later did to protect McInerney from federal or state prosecution for those crimes when the supervisory NYSP acted on that evidence.

Q. *Renna Tampered with DeFiglio for McInerney and Brown with Impunity,*

503. On or about August 2010, Renna called DeFiglio and told him that McInerney wanted him to know that if he did not talk to the NYSP again it would all be over soon and "they" would get him an attorney and *"it would all go away."*

504. Renna also told DeFiglio that "they" wanted him to know that Brown's family had a job lined-up for him in Vermont and he should move there,

505. DeFiglio disclosed the tampering and the NYSP arranged to record a telephone conversation but Renna did not return DeFiglio's calls or talk to him on the telephone again.

506. Trey Smith did not arrest or prosecute Renna for the witness tampering and never sought to question Renna about it, the AB forgery or his participation in gathering AAB or AB.

507. If obtained, Renna's truthful testimony would have been sufficiently corroborated by the substantial evidence already obtained and alone enough to convict McInerney and therefore likely lead to the conviction of all other guilty Dem C/O.

508. Those facts further corroborated the guilt of McInerney and Renna, but it was ignored by Trey Smith and Ogden relative to any prosecution against them.

509. The fact that McInerney, Brown and Renna had the audacity to tamper with DeFiglio during the investigation further proves they were in conspiracy with the prosecutor.

XIX. Trey Smith Adopted Purported Nonsensical Prosecution Theory Debunked by Common Sense, Evidence and DeFiglio in October/November 2009.

510. The record facts prove the following.

511. Almost immediately after his appointment (October 2009) Trey Smith began to seek evidence upon which to base and initiate a prosecution of McDonough.

512. Thereafter, throughout his investigation, Trey Smith and Ogden meticulously analyzed the

testimonial and documentary obtained in effort to find any theoretical basis for the prosecution of McDonough, however, nefarious, malicious and silly.

513. On or before November 6, 2009, Trey Smith and Ogden purportedly adopted a patently preposterous theory for the prosecution of McDonough that no objectively reasonable prosecutor would have considered, adopted or pursued based on the evidence.

514. Then, Trey Smith and Ogden questioned witnesses to obtain any evidence in support of that purported theory of prosecution, fabricated false evidence against McDonough to initiate and continue his prosecution based on it and blindly pursued his prosecution without probable cause even though it was debunked by DeFiglio, disproved by the evidence, contrary to common sense and absent of probable cause.

515. However, it is clear that the theory was merely a ruse to give an appearance that Trey Smith was supremely incompetent or misguided in the exercise of his discretion and simply initiated and continued an ostensibly proper but weak prosecution of McDonough.

516. In simplest terms, the preposterous prosecution theory was that Dem C/O defrauded numerous voters into signing AAB so they could file them to obtain and falsely vote AB for Democrat candidates, regardless of whether they were eligible to vote by AB or would do so, which they had to file in AB envelopes they also had to forge, but purposely did not enter false AB Agents and Excuses on any of those AAB they knew could not be filed for release of

the AB unless completed, so that McDonough could do it in *"the finishing process"* at his BOE *"forgery factory"* under the watchful eyes of partisan opposing political Party employees.

517. The record facts show that the purported prosecution theory was pure nonsense and known by Trey Smith and Ogden all along to be absurd.

518. No Dem C/O ever alleged that they purposely did not complete the AAB they had voters sign to obtain and vote their AB so that McDonough could falsely complete them, even after he forced their ostensible prosecutions and Trey Smith gave them immunity or favorable dispositions to incriminate him.

519. To the contrary, Brown, McInerney and others also admitted at trial that the theory was wrong.

520. In any case, there never was any evidence, allegation or reasonable suspicion that McDonough or anyone at the BOE forged any elections documents or operated a *"forgery factory"* solely for the *"finishing"* of incomplete AAB solicited by Dem C/O to forge AB.

521. Moreover, Trey Smith and Ogden knew that the object crime was the false voting of AB and the related falsification or forgery of AAB and AB envelopes were integral to them.

522. That fact could not have been missed by any reasonable officer investigating this matter. Thus, the entry of delivery agent names and excuses on AAB should never have been on the prosecution agenda at anytime, especially because almost all of the AAB in question were actually or ostensibly signed by the voters.

523. Furthermore, it was common knowledge by November 2009 that the AB forgery was committed by Dem C/O, primarily McGrath, Brown and McInerney and their helpers.

524. Nonetheless, Trey Smith obtained McDonough's indictment and sought to convict him by conspiratorially fabricating false testimony in support of that theory even though after it was specifically debunked by DeFiglio on or before November 6, 2009, as discussed.

525. Again, at the same time, Trey Smith ignored, failed to gather and/or follow the evidence and investigative leads sufficient to convict the Dem C/O who defrauded voters, forged AB votes, forged voter signatures and falsely filed AB documents.

526. Later, Trey Smith conspiratorially fabricated the false testimony of McGrath, Brown, O'Malley, Ogden, McInerney, Renna, Ogden and Robillard to initiate and continue it.

527. Furthermore, under State law, the innocuous entry of data onto an AAB after it is ostensibly signed by the voter has nothing to do with its authenticity and is not forgery.

528. Clearly, therefore, the theory was adopted solely to obtain the primary objectives of the conspiratorial scapegoat prosecution by shifting the focus of any investigation and prosecution away from the conspiratorial AB forgery committed by the Dem C/O onto the alleged non-criminal act of entering false information on authenticated and ostensibly authenticated AAB (signed) allegedly committed by one clerical person acting alone.

XX. Trey Smith Asked DeFiglio about McDonough. DeFiglio Admits AB Forgery and Debunks Prosecution Theory. Trey Smith Buried Detailed Facts DeFiglio Disclosed against McInerney in Handwritten Notes and Ignored Substantial Evidence Against Dem C/O.

529. On or about October 2009, DeFiglio agreed to cooperate with Trey Smith *pro se*.

530. Upon information and belief, on or about October and/or November 2009 and thereafter, Trey Smith and/or Ogden interviewed DeFiglio.

531. Trey Smith did not require DeFiglio to enter into a written cooperation agreement.

532. On or about November 6, 2009, DeFiglio gave a sworn written deposition.

533. However, in essence, only general facts and speculation about the AB forgery were recorded by Trey Smith and the NYSP in DeFiglio's deposition.

534. In substance, the following relevant admissions were recorded in DeFiglio's deposition: (a) the AB forgery was committed by the Dem C/O as part of a scheme to falsely vote AB of public housing voters; (b) Brown and McInerney were the primary culprits; (c) he assisted McInerney on a few occasions in September 2009; (d) McInerney had possession of all the signed but incomplete AAB that were obtained; and (e) the same scheme of falsely voting AB was perpetrated by DeFiglio, McInerney, Retina and other Dem C/O for more than 25 years. A copy of his deposition is attached as *Exhibit C* and incorporated herein by reference.

535. DeFiglio's deposition contains few specific facts about the AB forgery and no specific evidentiary facts and admissions about the criminal acts of DeFiglio, McInerney, Brown and the other Dem C/O who he admitted committed the AB forgery in 2009 and/or twenty-five (25) years prior thereto, including 2008 and 2007 elections.

536. It would appear from his deposition that Trey Smith and Ogden did not ask DeFiglio rudimentary questions about McInerney, Brown, other Dem C/O, the AB forgery and the 25 year scheme of Dem C/O that any reasonable investigator would have asked such a cooperating perpetrator in order to obtain readily available evidence.

537. It is obvious that Trey Smith and Ogden did not ask DeFiglio basic questions that would have resulted in his disclosure of more evidence against McInerney and other Dem C/O.

538. On the other hand, it is clear from DeFiglio's deposition that Trey Smith and/or Ogden questioned him specifically about McDonough and Trey Smith's purported prosecution theory even though there was no reason to suspect McDonough was involved in any crime.

539. It is also clear that Trey Smith and Ogden sought any incrimination of McDonough from DeFiglio because his rank speculation that McDonough *"had to know"* about the AB forgery is recorded in his deposition instead of specific evidentiary facts concerning the AB forgery committed by McInerney, Brown and/or any other Dem C/O in conspiracy.

540. DeFiglio's deposition makes clear that Trey Smith and Ogden did not ask him many basic questions that would have resulted in more evidence against McInerney and others.

541. For example, Trey Smith and Ogden did not elicit from DeFiglio many particular facts about the AB forgery, or 25-year AB forgery scheme despite his knowledge, willingness and ability to have provided the same against McInerney and Brown.

542. In fact, Ogden testified at trial that no attempt was made by Trey Smith or the NYSP to obtain any specific evidence from DeFiglio about the 2009 or prior AB forgery or the identity of those Dem C/O who had committed those when he gave his statement or thereafter.

543. In fact, however, only because McDonough went to trial, Trey Smith was required to disclose his own handwritten notes that showed DeFiglio had actually disclosed substantial detailed evidentiary facts about the AB forgery and McInerney on one or more occasions when interviewed by Trey Smith and/or Ogden on or about October/November 2009.

544. Trey Smith effectively buried that crucial testimonial in handwritten notes kept in his file and disclosed as Brady or Rosario material just before trial.

545. DeFiglio testified at trial that he was questioned by Trey Smith and Ogden but also by Trey Smith alone on one or more occasions.

546. In substance, DeFiglio disclosed to Trey Smith and/or Ogden that: (a) he and Galuski helped McInerney fraudulently obtain signed AAB from public housing voters before and on September 12,

2009; (b) they had voters sign incomplete AAB; (c) McInerney or other Dem C/O were going to falsely complete the AAB that voters signed; (d) he identified specific voters for whom McInerney or other Dem C/O were going to totally forge an AAB; (e) they were going to falsely complete or forge those AAB so that they could obtain and falsely vote AB; (f) he identified those voters who signed AAB that were falsely completed; and (g) he identified those voters for whom an AAB was totally forged.

547. Those detailed evidentiary facts directly incriminated McInerney in the forgery of specific AB documents for identified voters on specific dates.

548. More specifically, Trey Smith recorded in his notes that DeFiglio disclosed that on several occasions *before September 10, 2009*, he, Galuski and McInerney sought to have AAB signed by the following identified voters (13) for whom AAB were falsely completed or forged: (1) Amey; (2) Berrios; (3) Flores; (4) Gonzalez; (5) Ponce; (6) Rouse; (7) A. Santiago; (8) Torres; (9) Vasquez; (10) B. Ward; (11) M. Ward; (12) Washington; and, (13) Welling.

549. Trey Smith also recorded with respect to those AAB that DeFiglio: (a) identified five (5) that were *"totally forged"*; and (b) stated that *"it was unspoken they [the voters] would not get [AB] back."*

550. BOE records show that Aldrich was the named AB Agent on all of those (13) falsified and forged AAB and that they were filed at the BOE on September 10, 2009.

551. Nonetheless, McDonough was indicted for the forgery of those (13) AAB that DeFiglio essentially

admitted McInerney and/or other Dem C/O falsified or forged,

552. At trial, McInerney admitted that he does not recall which one of the other Dem C/O he had file those AAB but the record facts support the inference that it was Dan Brown.

553. Trey Smith also recorded in his notes that DeFiglio disclosed that again on September 12, 2009, he, Galuski and McInerney sought to have AAB signed by sixteen (16) specifically named voters for whom AAB were falsely completed or forged.

554. Trey Smith also recorded with respect to those (16) AAB that DeFiglio: (a) identified three (3) that were *"totally forged"* (because a voter had moved); and (b) stated he *"did not know but probably heard someone say at meeting a Griswold Heights 'just get them to sign [the AABJ"*' but *"does not recall specific instructions not to fill in the [AB Agent] or [Excuse] fields [on the AAB]."*

555. Trey Smith also recorded with respect to those AAB that DeFiglio disclosed *"McInerney would say if it appeared a voter moved ... that's ours"*, meaning that McInerney or another Dem C/O would totally forge that voter's AAB and AB.

556. BOE records identify which Dem C/O was the named AB Agent on each of those (16) falsified and forged AAB and that they were filed at the BOE on September 12, 2009.

557. McDonough was indicted for the forgery and/or criminal possession of those (16) AAB that DeFiglio essentially admitted McInerney and/or other Dem C/O falsified or forged.

558. Those detailed evidentiary facts were alone sufficient to convict McInerney and corroborated by substantial voter testimony and forged AB documents.

559. If followed, detailed evidentiary facts would have led to the discovery of other evidence sufficient to convict McInerney, Brown and all the other guilty Dem C/O.

560. However, Trey Smith and Ogden effectively buried those detailed evidentiary facts about the AB forgery and McInerney acts and admissions by recording them in notes which he kept in his file rather in his deposition or a report made part of the NYSP records, reviewed by supervisory NYSP and timely disclosed to McDonough in pre-trial discovery; contrary to good law enforcement practice and NYSP policy. A copy of Trey Smith's handwritten notes are attached as *Exhibit D* and incorporated herein by reference.

561. In any case, the detailed facts DeFiglio disclosed in 2009 were not used to prosecute McInerney, even after Renna tampered with him for McInerney and Brown in 2010.

562. The record fact prove that the testimonial evidence DeFiglio disclosed to Trey Smith was corroborated by substantial voter testimony and forged AB documents that was independently sufficient to convict McInemey. If followed, that evidence would have led to the discovery of more evidence sufficient to convict him and all the guilty Dem C/O.

563. DeFiglio testified at trial that he told Trey Smith and Ogden in 2009 and 2010, among other

things, that: (a) the AB fraud was committed by the Dem C/O, primarily McInemey and Brown; but not by anyone in the BOE; (b) the object crime was the false voting of AB; (c) the Dem C/O committed the AB forgery by having voters sign an AAB that they then completed with false Excuses and AB Agents so they could obtain and vote an AB for Democrats; (d) Dem C/O knew the AB process and related BOE practices, especially that AAB had to be completed with an Excuse and AB Agent to be filed before an AB for a voter could be obtained and voted; and (e) Dem C/O had voters sign but not complete an AAB so they could write a false Excuse and AB Agent on them and obtain and falsely vote their AB *"the right way"* without risk that the voters were not eligible to vote by AB or would not vote for Democrats.

564. DeFiglio also testified that Trey Smith and Ogden asked about their prosecution theory against McDonough when they questioned him on or before November 6, 2009.

565. More significantly, DeFiglio testified that when Trey Smith and Ogden asked him about their prosecution theory he told them it was wrong and made no sense.

566. DeFiglio testified that he told Trey Smith and Ogden in 2009 and 2010, among other things, that: (a) the AAB and AB were falsified and forged by McInerney, Brown and the Dem C/O; (b) the object crime was AB forgery and the "game" was to get voters to only sign AAB so they could be falsely completed and AB obtained and voted *"the right way"* regardless of whether a voter was eligible to vote by AB; (c) the AB fraud was committed by the Dem C/O

mainly McInerney and Brown; and, (d) public housing voters were targeted for AB forgery because they would be less likely to know, care or complain about it.

567. DeFiglio testified that Trey Smith and Ogden ignored what he told them because they *"did not want to hear if* and *"would not listen. "*

568. Even McGrath, McInerney and Brown admitted at trial that the theory was wrong.

569. Again, it was known by November 2009 and common sense dictated that the false completion or forgery of AAB was integral to their false voting of AB.

570. It was also common knowledge among the Dem C/O that the AB forgery was committed primarily by McInerney, McGrath, J. Brown, D. Brown, DeFiglio and Renna.

571. DeFiglio also testified that he would have told Trey Smith and Ogden everything he knew about the AB forgery, but *"they did not ask'* and *"they did not want to know. "*

572. The record facts prove that all of DeFiglio's testimonial evidence about the AB forgery was corroborated by substantial testimony and forged AB documents and alone sufficient to convict McInerney and Brown.

XXI. Trey Smith Misled Supervisory NYSP throughout Investigation with Blatant Falsehood that McInerney and Brown Could Not be Prosecuted

573. At the same time, from 2009 to 2011, Trey Smith misled supervisory NYSP by telling them the

blatant falsehood that McInerney and Brown could not be prosecuted because under applicable State law the evidence obtained was not legally sufficient to corroborate the testimony of DeFiglio or any accomplice or co-conspirator to conviction them.

574. In truth, the substantial testimonial and documentary evidence obtained was more than legally sufficient to corroborate the testimony of DeFiglio or any accomplice or coconspirator and convict McInerney and Brown as a matter of state law.

575. In truth, that evidence was sufficient to convict McGrath, Brown, McInerney and other Dem C/O from the beginning, even without the testimony of DeFiglio or any accomplice.

576. In 2011, McDonough exposed Trey Smith's blatant falsehood in defense motions and took other action that caused the FBI and NYSP to take action that forced the ostensible prosecutions of McInerney, Brown and Renna and the disclosure of their testimony that further exposed the conspiratorial prosecution.

XXII. Trey Smith Played "Bad Cop" and Threatened to "Fuck" McDonough to Set-up Initiation of Conspiratorial Scapegoat Prosecution.

577. In the fall 2009, McInerney asked McDonough several times not to talk to the NYSP or tell them he got the AB for the AAB Brown filed on Sept. 14, 2009.

578. At the same time, Chair Wade told McDonough that he should get an attorney and not talk to the NYSP.

579. Still, McDonough remained a cooperative witness and had no concerns about it.

580. That changed only when Trey Smith denigrated his deceased father and threatened him to prosecute him for the AB forgery.

581. On January 27, 2010, McDonough returned to the NYSP station for further questioning by Trey Smith. The relevant facts of the interview are set forth in McDonough's affidavit dated February 24, 2011, which is incorporated herein by reference.

582. At that time, Trey Smith began the interview by telling McDonough that his desire to be the county District Attorney was crushed when his father, the Democratic Party Chair, *"turned his back on me"* and *"wouldn 't even talk to me"* about that possibility.

583. Trey Smith told McDonough that he was not happy about the experience and, as Ogden walked into the room, said *"in finishing what I was talking about, I think you can now see how it is ironic that now we are here, I am Special Prosecutor and I have the ability to make you King for the Day"* and was giving McDonough the opportunity to tell *"everything"*, but warned that he was *"a very busy person"* who did not have *"any time to waste."*

584. When McDonough began to discuss what he previously told Ogden, Trey Smith interrupted and stated: *"I am a very busy man and I want you to tell me all about what went on with yon and your friends in your Forgery Factory"*

585. Trey Smith told McDonough he was going to "fuck" him like his father did him in the past and "if

you don't tell me anything more, the next time we speak will be at a Grand Jury."

586. The record facts show that Trey Smith had no legitimate reason or purpose for meeting with McDonough, especially without counsel present.

587. It is most evident from his failure to give Miranda warnings and demand for a confession without any regard for McDonough's Fifth or Sixth Amendment rights.

588. It is also obvious from the fact that he did not ask McDonough about any allegations, witness statements, documents or other evidence.

589. Of course, McDonough then acquired counsel and a deep distrust of Trey Smith.

590. Trey Smith later affirmed that he played a "bad cop" and threatened McDonough to scare him into giving information against McInerney. Those portions of Trey Smith's affirmation dated March 11, 2011 relevant to the matter are incorporated herein by reference.

591. However, the record facts and common sense belie Trey Smith's claims.

592. In the first place, Trey Smith already had obtained substantial evidence sufficient to convict McGrath and DeFiglio and, if followed, it would have led to the discovery of other evidence sufficient to convict McInerney, Brown, Dan Brown, Renna and all the Dem C/O.

593. Also, McDonough was a cooperative relatively minor fact witness, there was no reasonable basis to suspect that he had any substantive knowledge about the AB forgery and Trey Smith and Ogden did

not previously ask him or others basic questions that would have elicited relevant facts about the acts of McInerney, Brown and others.

594. Otherwise, as a past prosecutor and State Supreme Court law clerk with more than 25 years experience in criminal practice, Trey Smith could not have expected McDonough to confess to being the ring-leader of a *"forgery factory"* for the completion of AAB that Dem C/O had voters sign so they could then obtain and falsely vote their AB.

595. Nor could Trey Smith have expected that any person would believe he sought to have McDonough provide information against McInerney by threatening to prosecute him unless he confessed to crimes he did not commit.

596. In addition, as discussed, Trey Smith and Ogden had already purposely ignored or failed to obtain testimony, forged AB documents and other evidence that would have been sufficient to convict the Dem C/O who committed the AB forgery, especially McInerney.

597. Also, Trey Smith told McInerney and Brown that they would not be prosecuted and the supervisory NYSP that they could not be prosecuted.

598. Moreover, McGrath's conviction was *a fait accompli* and he could have been offered a plea deal for truthful information against his cohorts Brown, McInerney and the others.

599. Still, Trey Smith did not first prosecute McGrath and then offer him a plea deal in return for truthful information against Brown, McInerney and his other cohorts.

600. Also, Trey Smith did not return to DeFiglio or any cooperating perpetrator for more information that he was willing to provide against the Dem C/O.

601. Instead, Trey Smith threatened to "fuck" McDonough unless he confessed to the crimes the substantial evidence already obtained proved was committed by McInerney, McGrath, Brown and others in order to scare him into giving information against McInerney, whom he already told he was not going to prosecute, and, did not prosecute.

602. McDonough was also merely a non-essential fact witness who was cooperative and not accused, suspected or implicated in any crimes.

603. Lastly, Trey Smith could have followed the known evidence and obtained readily available evidence sufficient to convict McInerney, Brown, Renna and all the guilty Dem C/O just as Sr. Inv. O'Brien did in 2011 after McDonough defended his innocence, as stated.

604. On the other hand, McGrath, Brown, McInerney and O'Malley knew that McDonough would testify truthfully and incriminate them, especially concerning their actions on September 14, 2009, if he was properly questioned or called to testify.

605. Trey Smith knew there was no evidence upon which to obtain McDonough's indictment, especially if his truthful testimony was presented to the Grand Jury, as alleged.

606. Therefore, upon information and belief, Trey Smith threatened McDonough to keep him from testifying in the Grand Jury and avoiding indictment and incriminating others.

607. Upon information and belief, Trey Smith also did it to set-up his prosecution.

608. The record facts prove that McGrath, Brown, O'Malley and Ogden played key interdependent roles in the initiation and continued conspiratorial prosecution of McDonough.

XXIII. *Trey Smith Gave McGrath Immunity To Deny Any Guilt, Not Give Truthful Information Against the Dem C/O and To Falsely Incriminate McDonough.*

609. Immediately after Trey Smith threatened to "fuck" McDonough on January 27, 2010, he telephoned McGrath's attorney and offered his client immunity for "anything of value."

610. Several months later, McGrath entered a cooperation agreement that required he give complete, truthful information, but he denied any guilt or knowledge about the AB forgery contrary to the irrefutable voter testimony and AB documents that proved his guilt and made false accusations against McDonough that supported Trey Smith's silly prosecution theory.

611. Notably, contemporaneous billing record entries show that Trey Smith spoke briefly with McGrath's attorney by telephone on four occasions from January 27, 2010 to February 5, 2009 and then on March 2, 2010, prepared a cooperation agreement. Trey Smith's pertinent billing record entries are incorporated herein by reference.

612. Soon after McDonough obtained Trey Smith's initial time records, Trey Smith obtained a court order sealing those public records so McDonough could not again obtain them.

613. Upon information and belief, Trey Smith's time record entries show that from the date of his appointment on September 28, 2009 until the date he threatened McDonough on January 27, 2010, he spent little or no time investigating any Dem C/O known to be a suspect.

614. However, those records show that within an hour of threatening to prosecute McDonough he blindly offered McGrath immunity from prosecution.

615. Upon information and belief, before January 27, 2010, Trey Smith conspired with McGrath and others to fabricate McGrath's false incrimination of McDonough as a basis for his scapegoat prosecution.

616. On March 12, 2010, McGrath executed a written cooperation agreement and was questioned by Trey Smith and Ogden about the AB forgery. The Cooperation Agreement is incorporated herein by reference.

617. McGrath executed a written deposition on March 22, 2010, after reviewing and/or revising it with counsel and/or Trey Smith. His deposition is incorporated herein by reference.

618. Upon information and belief, Trey Smith and Ogden permitted McGrath, McInerney and others to review and revise their depositions after meeting with law enforcement, contrary to established law enforcement best practices and NYSP policy, rules or regulations.

619. Essentially, in his sworn statement, McGrath falsely incriminated McDonough and lied about everything, especially what occurred in McDonough's office on Sept. 14, 2009.

620. Specifically, therein McGrath alleged:

(a) He saw McDonough write false Excuses on two (2) AAB of the many he filed; and,

(b) On September 14, 2009, he heard McDonough and Brown talk about "*... the need to have names [for an AB Agent] listed on each of the [AAB] ... [he] took [] to mean that the "Released To " names were blank on the [AAB] they were speaking about, ... JWelch come up as a name that could be entered .... [He] remember[ed Brown] ... calling [Jim] from his cellphone ... [but did] not recall [Brown] mentioning the number of [AAB] ... [He] knew from the conversation ... there were roughly 35 [AAB] they were talking about .... [He] knew it would be difficult to track people down with the [AB] .... [He] wasn't sure who had the [AAB] at that point.... [He] told them both to make sure that they didn't mess with the voters from District 1. [He] specifically mentioned JWelch and told them both that his excuse was that he was a diabetic. [He] knew his [AAB] was in the pile because [he] had seen it Saturday when [he] met with Dan Brown and Aldrich at Corliss Park. [He] had also seen [ ] McDonough fill-in the blank excuses on the [AAB] of Dickinson and Taylor back in August.*"

621. McGrath also alleged that McDonough "kicked" him and Brown out of his office after mentioning AB Agent names apparently because he did not want them to be involved or witnesses to his false "finishing" of AAB.

622. McGrath did not mention that O'Malley was in the room at any time.

623. The accusations McGrath made against McDonough were directly contradicted and proven false by the voter affidavits and AB documents as well as the later trial testimony of Brown and J Welch.

624. Trey Smith and Ogden also knew that McGrath's denial of guilt was proven false by the voter affidavits and AB documents already obtained, as follows:

(a) *Dickinson AB Documents. McGrath* claimed: The voter entered Mason as AB Agent, McDonough entered a false Excuse and he signed voter's name with permission. *Dickinson* stated: He signed a voter registration card (or document) for McGrath; he did not give anyone any information on the AAB; and he did not receive an AB, sign an AB envelope or vote.

(b) *Taylor AB Documents. McGrath* claimed: The voter wrote Mason as AB Agent; he told McDonough the correct voter Excuse; and, he signed her name on AB envelope and voted her AB with her permission. *Taylor* stated: She signed a voter registration card; she never got an AB or gave anyone permission to vote it; and the Excuse on her AAB was incorrect.

(c) *John Gilbert AB Documents. McGrath* claimed: Gilbert had his wife sign his AAB; he wrote voter's AB Agent on his AAB; he does not recall who wrote the Excuse on his AAB; and, he signed the voter's AB envelope and voted his AB with permission. *Gilbert* stated: He could not read/write too well; he was not registered to vote; he never saw or signed an AAB; McGrath had him sign something; he did not believe it is his signature on AB envelope, but was not

certain; and, he never saw or voted an AB or just signed an AB envelope.

(d) *Stephan Carpenter AB Documents. McGrath* claimed: he signed and completed the voter's AAB with information from the voter; the voter signed his AB envelope and he voted the AB with permission and "licked the envelope and mailed it to the BOE as [he] did with all the ballots"; and, he knew the voter. *Carpenter* stated: McGrath asked to vote for him and he signed a voter registration form; he signed an AAB, but did not complete it, his name was spelled wrong and his address was wrong on both forms; he did not recall voting an AB or seeing AB envelope, but the signature looks like his; he did not recall checking boxes on a paper ballot; and he had no objection if his AB was voted for McGrath because he also knew his brother the State judge.

(e) *Marc Welch AB Documents. McGrath* claimed: he knew the voter and did not fill-out his AAB but introduced him to Brown and Aldrich and they completed the AAB with him; the voter signed his AB envelope and he voted the AB with the voter because the voter had trouble writing; and, he licked the AB envelope and sent to BOE for the voter. *Welch* stated: McGrath and [Mason] had him sign an AAB; he did not sign an AB; and he voted in person instead.

625. Trey Smith and Ogden knew that the evidence already obtained was sufficient to convict McGrath and proved that his purported cooperation was false in its entirety.

626. Upon information and belief, McGrath was given immunity solely to protect himself from

prosecution, keep him from incriminating the other Dem C/O and initiate the scapegoat prosecution of McDonough because he had no other reason to lie once immunized.

627. By November 2009, all the guilty Dem C/O had been silenced and prevented from being called as witnesses by being named targets, given no incentive to come forward or tell the truth and told not to be concerned because it would all be over soon.

628. Nonetheless, substantial irrefutable evidence was overwhelmingly sufficient to convict McGrath and, therefore, his prosecution was unavoidable without a scapegoat.

629. McGrath, Trey Smith and Ogden knew that the testimony and AB documents of voters, especially Welch and Taylor, would prove his guilt and the falsity of his cooperation.

630. They also knew, however, that if McGrath told the truth it would have led to the conviction of McInerney and everyone involved in the crimes.

631. At the same time, he could not truthfully incriminate McDonough for the crimes that he and his cohorts committed.

632. Thus, the only way Trey Smith could avoid convicting McGrath and other Dem C/O was to give him immunity to falsely accuse McDonough of forging AAB of those voters.

633. Consequently, the conspiracy required that McGrath be given immunity with impunity because the overwhelming and irrefutable evidence of his guilt, including the inevitable finding of his DNA on AB envelopes that he forged and licked close, would

also prove that he breached his cooperation agreement by not giving complete or truthful information.

634. The fact that McGrath falsely denied his own guilt to Trey Smith and Ogden and they accepted it as truthful when known to be false, alone proves the conspiracy alleged.

635. The fact that McGrath gave a false sworn statement about what happened in McDonough's office on September 14, 2009 to falsely incriminate him for Brown's crimes while at the same time failed to mention that O'Malley was present and sitting across the desk from Brown as he wrote Excuses on several AAB that Brown gave him, also proves it.

636. The conspiracy and set-up is also clear from the fact that Brown and O'Malley later gave fabricated testimony consistent with McGrath's false accusation and that could not have happened unless they all acted in conspiracy because they all knew that their testimony, although as consistent as possible, was fatally contradictory and false.

637. In addition, McGrath's failure to admit that he, McInerney, Brown or any of the other Dem C/O acted in conspiracy to commit the AB forgery (especially with respect to the AAB of Welch, Taylor and Dickenson that the record facts were completed in the handwriting of Brown or Dan Brown) even after given immunity and Smith's failure to prosecute him even though his purported cooperation and testimony was proven false by the voters and forged AB documents, also evidences the conspiracy to scapegoat prosecute McDonough at its inception.

638. According to Trey Smith, he blindly offered McGrath immunity for "anything of interest" only because by November 2009 his investigation was stalled, "many questions were unanswered" and he and Ogden thought McDonough knew more about McInerney.

639. Trey Smith further claims that on or about January 27, 2010 to March 12, 2010, McGrath unexpectedly dropped a bombshell of incrimination against McDonough.

640. However, the record facts and common sense belie Trey Smith's absurd claims.

641. No reasonable investigator or prosecutor investigating the matter would have blindly given McGrath immunity without knowing that he was going to give information worthy of such consideration especially because his conviction was a fait accompli.

642. The case was about "massive" voter fraud and, more importantly, the forgery of AB votes and signatures, and the evidence proved that McGrath committed those serious crimes in conspiracy with Brown, McInerney and others.

643. Nonetheless, instead of offering McGrath a plea deal only if he provided truthful information against Brown, McInerney and his other cohorts that was consistent with the evidence or returning to DeFiglio or any other cooperative witnesses for more information, he gave immunity to McGrath allegedly without knowing the nature of the cooperation first and then accepted his patently false statement and unexpected incrimination of McDonough to

commence prosecution against a clerk for allegedly entering data on AAB.

644. According to Trey Smith, it just happened that McDonough was the same cooperative witness who, although he was not accused, suspected or implicated in any crimes, he threatened to "fuck" unless he confessed to the AB forgery that McInerney and others committed to get him to incriminate McInerney even though he already told McInerney he would not be prosecuted, only moments before offered McGrath immunity "for anything of interest."

645. Furthermore, McGrath's patently false accusations just happened to soundly support the preposterous prosecution theory that Trey Smith allegedly adopted after that because before then there was no probable cause to suspect McDonough committed any crime when, in fact, he had questioned witnesses about and sought their incrimination of him before McGrath gave his patently false information and incriminated him.

646. Then, despite the fact that McGrath's purported cooperation was patently incredible and proven false by substantial evidence, Trey Smith relied on it to initiate the prosecution based on his false accusations and the nonsensical prosecution theory, as stated.

647. Also, the record facts asserted prove that McDonough was tapped for scapegoat prosecution long before Trey Smith threatened him and gave McGrath immunity.

648. Upon information and belief, Brown, O'Malley and other Dem C/O conspired and agreed prior to January 27, 2010 to then give whatever false

testimony was "needed" to corroborate McGrath's false testimony in the initiation and continuation of the prosecution.

649. Later, Trey Smith and Ogden absurdly defended McGrath's false testimony and failed to rescind his immunity even after his denial of guilt, failure to provide any information against the guilty Dem C/O and his patently incredible accusations against McDonough in breach of his cooperation agreement were proven false by substantial irrefutable evidence.

650. Trey Smith then conspiratorially prosecuted McDonough for non-criminal acts he did not commit (alleged entry of false information on authenticated AAB) instead of McInerney, McGrath and other Dem C/O for the serious crimes the evidence proved they did commit.

XXIV. Other Salient Evidence of Conspiracy to Scapegoat Prosecute McDonough.

A. *McNally Advised Martiniano to Not Disclose Facts Directly that Directly Incriminated Brown and McInerney because "It Will Be Over Soon."*

651. Upon information and belief, on/about September-December 2010, at LoPorto's Restaurant, Martiniano told McNally that he knew Trey Smith and NYSP talked to witnesses but they never contacted him and he had personal knowledge of facts relevant to the AB forgery.

652. Upon information and belief, at that time, Martiniano specifically asked McNally whether he should contact Trey Smith or the NYSP about the matter.

653. In fact, Trey Smith, Ogden and NYSP knew Martiniano and Renna were implicated in the AB forgery or material witnesses but they were never questioned.

654. Upon information and belief, in response, McNally told Martiniano that he should not contact anyone or worry because "*it was all going to go away soon anyway.*"

655. Martiniano relied upon McNally's advice because he was the county prosecutor.

656. Upon information and belief, McNally gave that advice without having any discussion with Martiniano about the facts of which he had knowledge.

657. In fact, as stated, McInerney and Brown admitted to Martiniano on September 12, 2009 that they were going to use AAB they had voters sign to forge AB.

658. Therefore, the advice McNally gave Martiniano effectively resulted in the further suppression of direct evidence of the guilt of McInerney and Brown as well as the innocence of McDonough that should have been obtained by Trey Smith and Ogden before his indictment.

659. Obviously, McInerney and Brown knew what they had told Martiniano.

660. Consequently, the personal relationships among McNally, McInerney, Trey Smith and other Dem C/O who committed the AB forgery is compelling circumstantial evidence of their conspiracy to scapegoat prosecute McDonough as alleged.

B. *McNally Made Extrajudicial Statements Likely to Prejudice McDonough.*

661. On September 29, 2011, during a WNYT newscast, McNally said McDonough's defense were *"ridiculous conspiracy theories"* and admitted he talked with him and McInerney about the case for the obvious implication that he was guilty.

662. Later, on or about October 19, 2011, during a Talk 1300 radio show interview, McNally said *"it would take an eternity"* to understand the logic of McDonough's motion to dismiss the indictment and disqualify *Trey Smith* based on his illegal appointment despite the fact it was based on well-settled law and a few indisputable record facts of which he was aware.

663. Upon information and belief, there could be no plausible reason for McNally's public comments after disqualification himself other than to further the scapegoat prosecution.

664. Later, McNally opposed McDonough's request that the county commence civil action to have Trey Smith's appointment nullified and opposed his motion for disqualification and dismissal knowing that he did not file a proper motion and therefore it was unlawful.

C. *Trey Smith Failed to Obtain McInemey's Cell Records.*

665. Trey Smith subpoenaed and reviewed the mobile phone records of McDonough, LoPorto, Brown, Welch and others but claimed that he and the NYSP were unable to obtain those of McInerney despite repeated efforts.

666. McNally refused a state freedom of information law request to provide the records of his public mobile phone, even redacted to protect law enforcement or personal privacy.

D. *No Law Enforcement Forensic Expert Witness Utilized During Investigation.*

667. Despite the fact that Trey Smith was conducting an investigation of AB forgery he did not obtain the services of one of the many qualified law enforcement Forensic Document Examiners (FDE) or handwriting experts that were available to analyze the questioned AB documents without cost during his investigation and prior to any Grand Jury presentation.

668. Upon information and belief, Trey Smith purposely did not request and obtain the services, of any such law enforcement FDE or handwriting expert because a proper examination of the forged and falsified AB documents would have required that handwriting exemplars first be obtained from any suspect and specifically, McGrath, McInerney, Brown, Dan Brown, Renna and other Dem C/O who were suspects, but not McDonough.

669. Upon information and belief, Trey Smith purposely did not request and obtain the services of any such law enforcement FDE or handwriting expert because he did not want proper and objective handwriting and forensic analysis or findings concerning the AB documents.

670. Upon information and belief, Trey Smith purposely did not request and obtain the services of any such law enforcement FDE or handwriting

expert because of the conspiracy to scapegoat prosecute McDonough and its objectives.

E. *No Handwriting Exemplars of Dem C/O Obtained During Investigation.*

671. In fact, Trey Smith purposely did not request and obtain handwriting exemplars of McGrath, McInemey, Brown, Dan Brown, Renna or any other Dem C/O for the purpose of having a proper forensic or handwriting analysis done concerning the questioned AB documents during his investigation, and specifically, before he began to present a case to the Grand Jury.

672. In fact, Trey Smith purposely did not request and obtain handwriting exemplars of McDonough for the purpose of having a proper forensic or handwriting analysis done concerning the questioned AB documents during his investigation, and specifically, before he began to present a case to the Grand Jury for writing false AB Agent names and Excuses on all of the AAB that the Dem C/O had or ostensibly had voters sign.

673. Upon information and belief, Trey Smith purposely did not request and obtain handwriting exemplars from McGrath, McInerney, Brown, Dan Brown, Renna, the other Dem C/O who were suspects or McDonough before he began to present a case to the Grand Jury because he did not want proper and objective handwriting and forensic analysis or findings concerning the AB documents before he presented a case to the Grand Jury to initiate the prosecution of him because of the conspiracy to scapegoat prosecute him.

F. *Effort to Coerce McDonough to Plead Guilty. McDonough Tells Trey Smith He Will Expose Scapegoat Conspiracy.*

674. On or about January 2010 and thereafter up to and including January 28, 2011, Trey Smith sought to coerce McDonough into pleading guilty to avoid indictment.

675. The effective suppression of the truthful testimony of O'Malley, Martiniano, McInerney, Renna, Galuski, Campana and others that would have exculpated McDonough and the false testimony of McGrath and Brown would never have been undone if McDonough had plead guilty in the face of a grossly over-charged indictment.

676. Also, Renna would never have come forward, all the Dem C/O would have asserted their 5th Amendment right to remain silent to keep from testifying and Trey Smith would have simply discredited and marginalized Martiniano if he later came forward.

677. However, because he was innocent, the conspiracy did not end in McDonough's plea because he refused to succumb to coercion even after Trey Smith targeted him for prosecution as the mastermind of the AB forgery and leaked that his indictment was imminent.

678. Furthermore, even after McGrath in March 2010 made his false accusations against McDonough as stated, there was no reasonable cause to believe McDonough forged any AB or committed any crime concerning AAB.

679. Also, there could be no credible evidence against McDonough because he committed no crime

and was not involved in the AB forgery of the Dem C/O.

680. On the other hand, by November 2009, there was substantial evidence to prove that all the AB released on AAB the Dem C/O filed on September 12, 2009 and September 14, 2009 were forged by McInerney, McGrath, Brown, Renna and others in conspiracy.

681. In fact, McGrath, McInerney, Brown and Renna falsely voted all the forged AB and sealed the AB envelopes in which they were filed.

682. Also, Trey Smith took no further substantive action in the investigation of the AB forgery after McGrath falsely incriminated McDonough in March 2010.

683. At all times on or about July 2010 and thereafter, McDonough informed Trey Smith through counsel that he would provide truthful testimony if called upon to testify but if prosecuted would seek vindication by dismissal or trial verdict,

684. More specifically, after Trey Smith disclosed copies of all witness statements obtained through the private and criminal investigations and related records, on or about July 2010 and all times thereafter, McDonough informed Trey Smith that it was obvious from all the evidence that the AB forgery was committed by those Dem C/O he sought not to prosecute; i.e. McGrath, Brown, McInerney, DeFiglio, Renna and others.

685. In fact, at all times thereafter, defense counsel repeatedly told Trey Smith that if McDonough was wrongfully prosecuted he would take all proper

actions to expose the scapegoat conspiracy in defense of any such unlawful and reprehensible action.

G. McDonough's DNA Allegedly Found on Three (3) AB Forged by McInerney and Renna That Supports Prosecution Theory Is Further Evidence of Conspiracy.

686. Upon information and belief, because of the alleged conspiracy, Trey Smith knew from McInerney, Brown and McGrath, indirectly through his counsel and/or McNally, that: (a) DNA of Renna likely would be found on several AB envelopes he forged; (b) DNA of McGrath likely would be found on several AB envelopes; (c) the DNA of McInerney likely would not be found on any AB envelopes because he used gloves and water to seal AB envelopes when he forged them; and the DNA of Brown would likely not be found on any AB envelope because he did not seal them.

687. Upon information and belief, Trey Smith knew the DNA of McInerney, Brown or Dan Brown would not be found on any AB envelopes because he told them they would not be prosecuted before DNA testing was sought (although McInerney forged all or most of them).

688. Upon information and belief, Trey Smith must have known that McGrath's DNA would be found on the AB he forged.

689. Also, Trey Smith never questioned Renna or named him as a suspect so no AB envelope was tested for his DNA at that time.

690. On or about July 2011, Trey Smith obtained a court order compelling McDonough, LoPorto, McInerney and/or other to submit to DNA testing.

691. On various dates thereafter, Trey Smith had numerous AB envelopes tested for DNA even though the focus of his investigation was never centered on AB forgery.

692. Upon Trey Smith's direction, the NYSP tested numerous AB envelopes for DNA.

693. Thereafter, the NYSP crime lab allegedly found McDonough's DNA on the sealed portion of three (3) forged AB envelopes (voters Testa, Robertson and Suozzo).

694. Interestingly, McDonough's DNA was allegedly found: (a) only after the NYSP crime lab used extraction methods Trey Smith proposed after multiple attempts following established protocols resulted in negative findings and Trey Smith monitored its utilization; (b) only on three AB envelopes; and, (c) only on the AB envelope of voters who were not among the public housing residents known to have been asked to sign AAB by McGrath, McInerney, DeFiglio, Brown, Dan Brown, LoPorto, Galuski, Aldrich or any other Dem C/O on or before September 12, 2009.

695. Also, McInerney forged voter Suozzo's AB but he did not mention McInerney in his deposition, and, Renna forged the Testa and Robinson AB but had no contact with them and was never questioned or identified as a suspect by Trey Smith, even after he tampered with DeFiglio for McInerney and Brown in 2010 to keep him quiet.

696. Therefore, it just so happened that McDonough's DNA was extracted from AB envelopes of voters that, as long as McInerney and Renna did not testify, would appear had no contact with any

Dem C/O for the false implication that they must have been forged "behind the counter" by McDonough which just happened to support the prosecution theory.

697. The DNA was found using Trey Smith's new technique in his and Ogden's presence, after none was extracted from many other envelopes.

698. However, McDonough determined and disclosed to the supervisory NYSP after his indictment that: (a) the AAB for voters Testa and Robertson appeared to be completed entirely in the uniquely identifiable handwriting of Renna (for which he was later prosecuted only because of the action of McDonough and supervisory NYSP), and, (b) the 2008 and 2007 AAB for voter Suozzo appeared to be completed in the uniquely handwriting of McInerney.

699. McDonough recalled seeing Renna only once in that election period and assisting him in filing two (2) AAB for the 2009 WFP primary while working openly at the office counter with other BOE employees nearby.

700. McDonough recalls that in assisting Renna he inserted those AB into envelopes.

701. However, McDonough had no contact with Suozzo or his AB envelope, did not falsely vote any AB or forge any AB envelope and was not indicted for doing so.

702. Thus, the finding of his DNA on those envelopes is innocuous or questionable.

703. Ogden collected McDonough's DNA and, upon information and belief, attended the NYSP crime lab

when Trey Smith went there to monitor its testing of those AB envelopes.

704. McInerney admitted at trial that Renna was like a father figure and his mentor.

705. McDonough was not involved in the forgery of any AB envelope, he did not lick or seal any of those AB envelopes and no saliva was present or tested on any AB envelope.

706. Therefore, if McDonough's DNA was truly present on any of those AB envelopes it is only because of incidental handling, the environment or some contamination.

707. The only significance of the alleged finding of McDonough's DNA on those AAB concerns the fabricated false trial testimony of McInerney and Renna, as discussed below.

H. *Trey Smith Begins Grand Jury Action Against McDonough When No Credible Testimony for Indictment.*

708. On or about September 2010, Trey Smith commenced a Grand Jury proceeding against McDonough and LoPorto.

709. At the same time, Trey Smith served subpoenas with McDonough as a defendant and leaked to the media that he was the primary target whose indictment was imminent.

710. In support of a DNA application, Trey Smith submitted the affidavit of Ogden in which he alleged the AB forgery was committed in conspiracy by McGrath, Brown, McInerney and others, including McDonough.

711. However, Trey Smith did not present a conspiracy charge before the Grand Jury, never charged any Dem C/O of committing the AB in conspiracy and never intended to indict or prosecute McGrath, Brown, McInerney and other Dem C/O who committed the AB forgery.

712. Trey Smith had no handwriting or forensic evidence against any person.

713. More importantly, Trey Smith had no credible evidence whatsoever to even establish reasonable cause to believe that McDonough committed AB forgery or any crime.

714. Trey Smith had only the fabricated false accusations of McGrath about two (2) AAB and a purported conversation between he and Brown about AB Agent names, as stated, and the essentially meaningless purported finding of McDonough's DNA on three (3) AB envelopes.

715. Therefore, it would have been plain to any reasonable investigator or prosecutor that there was no reasonable cause to suspect McDonough committed AB forgery or any crime.

716. Nonetheless, on or about September 2010 to January 2011, Trey Smith sought to coerce McDonough into pleading guilty through routine leaking of information, abuse of process and other scare tactics while he presented evidence before a Grand Jury.

717. Again, however, McDonough stood on his innocence and refused to bow.

I. *McDonough's Notice of Intent to Testify and Request for Witness Testimony.*

718. In September 2010, McDonough gave Trey Smith notice of his intent to testify in Grand Jury and request that Bugbee, O'Malley and others be called as witnesses on his behalf.

719. That fact was reported in the local newspapers and, upon information and belief, was known by McInerney, McNally, the Democratic Chairman and others.

J. Trey Smith, McNally, McInerney and Chair Wade Acted in Concert to Keep McDonough and Bugbee from Testifying in Grand Jury.

720. Upon information and belief, Trey Smith knew that the fabricated false testimony of McGrath was insufficient to obtain such an indictment, especially if challenged.

721. Upon information and belief, Trey Smith knew that the false testimony of Brown, Ogden and O'Malley had to be fabricated to be as plausibly consistent as possible with McGrath's fabricated false testimony, especially regarding the events of September 14, 2009 in McDonough's office if he testified as noticed.

722. Upon information and belief, Trey Smith also knew that McDonough would incriminate McGrath, Brown and McInerney in AB forgery and perjury if he testified.

723. Upon information and belief, Trey Smith also intended to obtain a grossly overcharged indictment to coerce a guilty plea or obtain a wrongful conviction at trial.

724. Therefore, after McDonough gave notice of his intent to testify, upon information and belief

McInerney, McNally, Chair Wade and Trey Smith took action to prevent McDonough from testifying and avoiding a grossly over-charged indictment.

725. Upon information and belief, Trey Smith, McInerney and McNally knew that action was critical to the scapegoat prosecution because there can be no other plausible reason for McNally to once again involve himself in the matter from which he disqualified himself purportedly because of his political relation with McInerney by giving legal advice to the primary target of a Grand Jury case, especially when all other pertinent facts are considered.

726. Initially, Chair Wade told McDonough that he recommended against him testifying before the Grand Jury.

727. Soon thereafter, McNally called McDonough, without the knowledge or consent of his attorney, to give him the names of attorneys to retain in substitution of record counsel.

728. McInerney acted as McNally's messenger in giving those names to McDonough.

729. On December 6, 2010, McNally left McDonough a voice message to call him.

730. On December 7, 2010, BOE employee Mary Sweeney told McDonough that McInerney gave her the names of two attorneys McNally said he should contact because they would *"do a good job at a lesser fee"* than his attorney.

731. On December 8, 2010, McNally answered McDonough's return call and asked if he had *"gotten the message from our friend"*, but when asked his

advice about testifying before the Grand Jury, said *"I can't answer that question, I got to go"* and ended the conversation.

732. Shortly after that call, Chair Wade called and told McDonough that one of the two named attorney's owed him a favor and he would make a call for him.

733. When called, that attorney told McDonough that he likely would not have him testify before the Grand Jury and could probably resolve the case without too much expense.

734. Then, before the date McDonough would be permitted to testify, O'Malley and other BOE employees told McDonough that Trey Smith had treated them in an aggressive and rude manner ("almost as if they were criminals").

735. Upon information and belief, Trey Smith's actions were further tactics to scare, intimidate and prevent McDonough from testifying in conjunction with his personal derogatory remarks and the threat of prosecution he made to McDonough at the NYSP station.

736. Trey Smith also ensured that Bugbee did not testify before the Grand Jury about AB protocol and procedures or the 2007 and 2008 AAB that he believed were forged by McInerney but ignored by Trey Smith by advising him that if he testified he might incriminate himself in elections crimes and be prosecuted so he would be required to waive immunity and it was in his interests to retain an attorney.

737. Upon information and belief, Trey Smith's actions were also purposeful tactics to intimidate,

scare and prevent Bugbee from testifying about facts that would tend to exonerate McDonough and incriminate McInerney in the AB forgery.

738. All of those actions and orchestrations instilled in McDonough more concern and distrust of Trey Smith and caused him not to testify before the Grand Jury contrary to the strong advice and recommendation of his attorney.

739. McDonough believed that Trey Smith was intent on fabricating false testimony to wrongfully prosecute him instead of the Dem C/O guilty of the AB forgery and he did not trust him to properly and fairly present the matter before the Grand Jury.

XXV. Conspiratorial Fabrication of False Testimony to Initiate Prosecution.

740. When the orchestrations to coerce McDonough into pleading guilty did not work Trey Smith then had to fabricate the false testimony of Ogden and O'Malley to be as consistent as possible with McGrath's false testimony, especially if he did testify.

741. In fact, the record facts show that McGrath and O'Malley all played vital interconnected roles in the conspiratorial fabrication of false testimony to initiate the scapegoat prosecution of McDonough because if any one of them told the truth, especially about what happened in his office on September 14, 2009, he could not have been prosecuted.

742. The record facts prove that Ogden also played a key role in the initiation of the prosecution through patently false and improper purported expert law enforcement testimony.

743. The record facts also prove, however, that the conspiratorially fabrication of the false testimony of those key conspirators evolved to the absurd through the process, especially when the trial testimony of McInerney and Renna was forced though the actions of McDonough, Sr. Inv. O'Brien and the FBI in exposing the conspiracy, as discussed.

A. *Trey Smith and Ogden Emails Show Lack of Evidence and Conspiracy in Prelude to Ogden's Fabricated False Grand Jury Testimony to Initiate Prosecution.*

744. In any event, as said, when Trey Smith began presenting a case before the Grand Jury to indict McDonough the purported evidence against him was essentially non-existent.

745. Trey Smith and Ogden essentially admitted that fact in emails related to DNA.

746. In an email dated September 27, 2010, Trey Smith stated: "Now I'm thinking maybe I start off with an indictment of both LoPorto and McDonough instead of just Loporto ... I don't think any statements from McDonough to third parties (NYSP) explicitly incriminate LoPorto and none from LoPorto (to Couch) explicitly incriminate McDonough .... "

747. In reply, by email dated September 29, 2010, Ogden stated: "I agree with indicting both of them. At the very least that McDonough is guilty of official misconduct. " A copy of those emails is attached as Exhibit "E" and incorporated herein by reference.

B. *McGrath's Conspiratorially Fabricated False Testimony to Initiate Prosecution.*

748. Upon information and belief, on or about December 8, 2010, McGrath testified before the Grand Jury in accordance with his prior statement.

749. In substance, McGrath testified that he witnessed McDonough write false Excuses on the Dickenson and/or Taylor AAB and on another date overheard McDonough talking with Brown about names he intended to write as AB Agents on about thirty-five (35) AAB that the Dem C/O had voters sign on and/or before September 12, 2009.

750. Again, McGrath testified that McDonough "kicked" him and Brown out *of* his office after mentioning AB Agent names to be entered on AAB apparently because he did not want them to be involved or witnesses to his false "finishing" *of* AAB.

751. Again, however, McGrath did not mention that O'Malley was in the room when he and Brown were there.

752. Upon information and belief, McGrath also denied having committed the AB forgery or criminal acts in conspiracy with Brown, Dan Brown, McInerney and other Dem C/O.

753. Upon information and belief, at that time, McGrath intentionally did not testify truthfully about material facts known to him concerning the AB forgery that would have incriminated Brown, McInerney and others in the AB forgery, incriminated Brown in perjury, exonerated McDonough from any indictment or prosecution in the matter and exposed the conspiratorial scapegoat prosecution.

754. Specifically, McGrath did not admit that he committed the AB forgery in conspiracy with Brown, McInerney, Dan Brown, DeFiglio, Renna and others.

755. Upon information and belief, McGrath's testimony was false in all material respects and fabricated in conspiracy with Trey Smith and/or others to initiate the scapegoat prosecution *of* McDonough and obtain the objectives *of* their extrajudicial conspiracy, as alleged.

756. McGrath's fabricated false testimony incriminated McDonough in alleged acts which he did not do, but for which he was indicted as a direct result thereof.

757. More significantly, McGrath's false testimony set the foundation for the false testimony *of* Ogden, Brown and O'Malley as discussed below.

C. *Ogden's Conspiratorially Fabricated False Testimony to Initiate Prosecution*

758. Upon information and belief, on or about January 13, 2011 and January 24, 2011, Ogden testified before the Grand Jury, in substance, that he reviewed the handwriting on the Dickenson and/or Taylor AAB and all the other allegedly falsified or forged AAB filed in the subject WFP (about 40) and in his experience as a NYSP investigator it was his opinion that the AB Agent and Excuses on all those AAB were written in the same handwriting and appeared to reflect a distinct pattern that showed they were all falsified by the same person.

759. Upon information and belief, at the same time, Ogden failed to testify about relevant evidence obtained during the investigation that would have exonerated McDonough and proved that the subject

AB forgery was committed by known Dem C/O, including McGrath.

760. Upon information and belief, Ogden intentionally did not testify truthfully about material facts known to him concerning the AB forgery that would have exonerated McDonough from any indictment or prosecution with respect to the matter.

761. Upon information and belief, Ogden's testimony was false in all material respects and fabricated in conspiracy with Trey Smith and/or others to initiate the scapegoat prosecution of McDonough and obtain the objectives of then extrajudicial conspiracy, as alleged.

762. In fact, the Excuses and AB Agents on all those AAB do not appear to the naked eye and observer to have been written in the same handwriting by the same person and the record facts prove that they were not.

763. No reasonable investigator could have offered such patently improper and false testimony or purported expert investigator opinion testimony.

764. Ogden's fabricated false testimony incriminated McDonough in alleged acts which he did not do but for which he was indicted as a direct result thereof.

765. More significantly, Ogden's false testimony provided the sole basis for the indictment of McDonough for most the counts of the indictment filed against him.

766. Ogden's testimony was the basis for McDonough's indictment on all charges except the ten (10) AAB that related to the false testimony of

McGrath and O'Malley and the three (3) AB envelopes that related to the purported DNA evidence, as described.

767. Upon information and belief, the AB Agents and Excuses on all the relevant AAB were not written in the same handwriting, as Ogden testified.

768. Ogden later admitted at trial that his purported law enforcement expert testimony before the Grand Jury was not correct and a mistake.

E. *O'Malley's Conspiratorially Fabricated False Testimony to Initiate Prosecution*

769. On or about December 9, 2009, O'Malley appeared before the Grand Jury in response to subpoena openly served upon him at the BOE.

770. At that time, Trey Smith elicited O'Malley's truthful testimony that he wrote Excuses on several of the AAB upon which he wrote Excuses in McDonough's office on September 14, 2009, which he was shown.

771. At that time, Trey Smith did not show O'Malley all eight AAB on which he wrote the Excuses that Brown gave him while in McDonough's office on September 14, 2009.

772. O'Malley testified vaguely that the person who gave him those Excuses was *"probably the candidate"* who got that information from *"probably an operative."*

773. In truth, as stated, O'Malley got all those Excuses he wrote on the AAB from Brown (the candidate) after Brown made a telephone call to McInerney (the operative) and told O'Malley that he

had the Excuses the voters gave so it could be entered on the AAB, as stated.

774. Upon information and belief, O'Malley's initial testimony was orchestrated by Trey Smith as a ruse to hide from McDonough the fact O'Malley would return to the Grand Jury and falsely accuse him of making him write false Excuses on AAB in his office.

775. The fabrication of O'Malley's false testimony by Trey Smith is further evidenced by certain relevant memoranda and emails between Trey Smith, Ogden and O'Malley's attorney. Relevant memoranda/email are attached as *Exhibit "F"* and incorporated herein by reference.

776. Those memoranda and emails show, in substance, that before and/or after O'Malley first testified before the Grand Jury, Trey Smith purportedly analyzed the AAB and determined that his handwriting appeared on many AAB and, therefore, he could be prosecuted as a "kingpin" of the AB forgery.

777. Then, on or about December 13, 2010 at 2:45 a.m., Trey Smith directed Ogden to contact O'Malley and warn him that he should get an attorney because there were perjury problems with his Grand Jury testimony.

778. Upon information and belief, Ogden did so that same day.

779. Thereafter, on December 14, 2010, Trey Smith contacted the BOE and informed its employees under subpoena that the Grand Jury scheduled for the next morning was cancelled.

780. That same day, Trey Smith called McDonough's counsel to specifically confirm that the Grand Jury scheduled for the next morning had been cancelled.

781. Then, on December 15, 2010 at 4:10 a.m., Trey Smith sent O'Malley's attorney an e-mail threatening to prosecute him for AB forgery and warning that it made no sense for him to protect his boss, who was likely going to be publicly disgraced and imprisoned.

782. Later that morning, O'Malley took a personal day off and re-appeared before the Grand Jury without informing anyone in the BOE about it.

783. That day, O'Malley returned to the Grand Jury and testified, in substance, that on September 14, 2009, his boss McDonough called him into his office and told him to make-up Excuses and write them on those eight (8) AAB, so he did.

784. At trial, however, O'Malley admitted that Trey Smith called him at his home the night before he returned to the Grand Jury, although he had never done so before.

785. O'Malley testified, however, that he could not recall anything he and Trey Smith discussed; he could not recount one word of anything discussed.

786. Upon information and belief, O'Malley's testimony was false in all material respects and fabricated in conspiracy with Trey Smith and/or others to initiate the scapegoat prosecution of McDonough and obtain the objectives of their extrajudicial conspiracy, as alleged.

787. Upon information and belief, O'Malley's surreptitious return to the Grand Jury was orchestrated by Trey Smith to avoid exposing O'Malley's false testimony and the conspiracy to McDonough. Several relevant contemporaneous e-mails between Trey Smith and McDonough's defense attorney concerning the matter are incorporated herein by reference.

788. Upon information and belief, O'Malley's truthful testimony would have incriminated Brown and McInerney in the AB forgery, incriminated McGrath and Brown in perjury, exonerated McDonough and exposed the conspiratorial scapegoat prosecution.

789. Upon information and belief, O'Malley intentionally did not testify truthfully.

790. Specifically, O'Malley did not admit that Brown told him the Excuses to write on those AAB in McDonough's office in the presence of McGrath and that he did not commit any crime while assisting Brown nor, to his knowledge, did McDonough.

791. Upon information and belief, at that time, O'Malley intentionally did not testify truthfully about the delivery of the AB released on the AAB filed on September 14, 2009 to McInerney that also would have incriminated Brown and McInerney in the AB forgery, incriminated Brown and McGrath in perjury, exonerated McDonough from any indictment or prosecution with respect to the matter and exposed the conspiratorial scapegoat prosecution.

792. Upon information and belief, O'Malley's testimony was false in all material respects and fabricated in conspiracy with Trey Smith and/or

others to initiate the scapegoat prosecution of McDonough and obtain the objectives of their extrajudicial conspiracy, as alleged.

793. O'Malley's fabricated false testimony incriminated McDonough in alleged acts which he did not do, but for which he was indicted as a direct result thereof.

794. More significantly, O'Malley's false testimony was given to be consistent with the false testimony of McGrath and Ogden and the prosecution theory, as discussed.

795. Upon information and belief, the record facts show that Trey Smith knew O'Malley was in McDonough's office on September 14, 2009 because he knew O'Malley wrote Excuses on those AAB even though McGrath did not mention him and Brown did not testify.

796. Upon information and belief, O'Malley and McGrath told Trey Smith that O'Malley wrote the Excuses that Brown gave him onto those eight (8) AAB.

797. The conspiracy is also proven by the fact that O'Malley knew the truth, but played along with Trey Smith's charade of appearing as if he committed perjury in his initial Grand Jury testimony (when he had not) and that he was worried about being indicted as a kingpin in the AB forgeries (when he was not).

798. O'Malley testified at trial that he was a nervous person afraid of his own shadow, had never committed any crime before and knew the investigation centered on "his boss."

799. Therefore, if O'Malley, McGrath and Brown were not acting in conspiracy with Trey Smith none of them would have been able to lie consistently about those facts.

800. Upon information and belief, the record facts, make it obvious that O'Malley got the "word" not to talk and McGrath, Brown, Trey Smith and/or others did not want to expose him as a co-conspirator unless and until necessary.

801. Upon information and belief, therefore, McGrath did not mention O'Malley when he gave his statement in March 2010 or testified in the Grand Jury.

802. Upon information and belief, however, Trey Smith knew that he "needed" O'Malley to give false testimony before the Grand Jury to obtain an indictment after McDonough gave notice of intent to testify.

803. Upon information and belief, Trey Smith gave O'Malley immunity with impunity from the prosecution for his false testimony against McDonough just as he did McGrath.

804. Upon information and belief, McGrath and Brown knew that O'Malley could not be named as a suspect in order to prevent him giving testimony because he did nothing wrong.

805. Therefore, O'Malley would be called as a witness unless McDonough pled guilty.

806. More importantly, O'Malley, McGrath and Brown knew that if O'Malley told the truth he would exonerate McDonough and expose all of them to prosecution and civil liability.

807. Upon information and belief, O'Malley's false testimony was therefore fabricated by Trey Smith and the others to be direct proof of McDonough's guilt because that was the false inference of McGrath's false testimony (i.e. McDonough had him write false Excuses on AAB).

808. Their conspiracy is also proven by the fact that McGrath, O'Malley, Brown, McInerney and others could have told the truth about all the facts at any time, but they did not.

XXVI. Seventy-Four (74) Count Indictment.

809. On January 28, 2011, McDonough was charged by indictment with thirty-eight (38) counts of felony Forgery in the Second Degree (PL § 170.10(2) and thirty-six (36) counts of felony Criminal Possession of a Forged Instrument in the Second Degree (PL § 170.25 (Counts 52 - 87), for a total of seventy-four (74) counts.

810. Trey Smith obtained the grossly-overcharged indictment against McDonough based solely on the fabricated false testimony of McGrath, O'Malley and Ogden after having about fourteen months to follow, gather and meticulously analyze the evidence.

811. Notably, the charges concern the alleged entry of false data on signed AAB and AB, but not the false signatures or votes on those documents that those Dem C/O who were not indicted had forged and filed to illegally affect the outcome of an election.

812. On the date of indictment, McDonough made to suffer a "perp-walk" of being processed and temporarily detained at the police station until taken into custody of the NYSP, handcuffed, transported and walked before the court and media before the

court. At arraignment, Trey Smith requested the forfeiture of any passport pending disposition of the case and McDonough's liberty was restricted to travel within the United States.

XXVII. Trey Smith Notarized Alleged Forged Signatures on Two Voter Affidavits Admitted Before Grand Jury for Indictment.

813. To obtain the seventy-four count indictment, Trey Smith had to subpoena and present the testimony or CPL 190.40 affidavits of all the voters before the Grand Jury.

814. Relevant records of his investigation show that Trey Smith and the NYSP had some difficulty in locating, serving and ensuring the appearance of all those witnesses.

815. Trey Smith prepared and notarized affidavits of voters to be admitted to the Grand Jury in lieu of their testimony concerning falsification of their AAB ("Forgery Affidavit").

816. At trial, two of those voters testified that the signature on their purported Forgery Affidavit was not genuine.

817. College student Jermaine Joseph was the first prosecution witness.

818. Immediately upon being shown his purported Forgery Affidavit, he testified that the signature Trey Smith notarized above the juxtaposed name "Joseph Jermaine" was not his.

819. Mr. Joseph testified that he never saw the document before and found it humorous that his name was incorrectly juxtaposed in print several places without correction.

820. He said he never would sign such a document without correcting such an error.

821. In chambers, Trey Smith perspired so profusely that sweat literally dripped down his face as he straggled to address the issue with the Court.

822. Notably, even the trial court stated on the court record: "*... The whole trial - the first witness out of the box says there's a forged instrument that the People presented.*" The relevant portion of the court transcript is incorporated herein by reference.

823. Thus, the first witness in a case of alleged entry of false data on voter affidavits testified that the prosecutor notarized a forged signature on his purported Forgery Affidavit.

824. Later, voter Jolene Van Vranken testified similarly.

825. Mrs. Van Vranken also signed a court exhibit which clearly demonstrated that her signature did not match the one notarized by Trey Smith.

826. She also confirmed her testimony in affidavits given to private investigator and a N.Y.S. Attorney General investigator. Her Forgery Affidavit, portion of her relevant trial testimony, trial exhibit are attached as *Exhibit "G"* and incorporated herein by reference.

827. In court and chambers, Trey Smith was again speechless, but ripe with perspiration when he was confronted with the similar testimony of a second prosecution witness.

828. Trey Smith did not question those voters to establish that they were wrong in their testimony while on the stand and opposed a motion for hearing

on the issue but later contradicted their unimpeached testimony by affirming that they signed their affidavits in his presence.

829. Nonetheless, the truth of the voters' unimpeached testimony was confirmed by Trey Smith's profuse sweating, inability to maintain his composure, inexplicable comments and the affidavits themselves; the signatures on which do not appear to match that of the voters.

830. Later, private and Attorney General Investigators obtained affidavits from voter Van Vranken and her husband as well the opinion of a privately retained certified **FDE** which all confirmed the voter's trial testimony that the signature Trey Smith notarized was not hers. Those statements and reports are incorporated herein by reference.

XXVIII. Trey Smith Acted Beyond Scope of Law by Prosecuting Alleged Acts that Do Not Constitute the Crimes Charged as a Matter of Law

831. The evidence before the Grand Jury established that all of the questioned AAB were signed or ostensibly signed by the voters when they were brought into the BOE for filing.

832. Under New York law, a document is a forgery only when its authenticity is misrepresented, not whenever it contains a falsehood or misrepresentations not relevant to the identity of the maker.

833. Therefore, for all the reasons discussed, Trey Smith prosecuted McDonough for alleged acts that do not constitute the forgery crimes charged as a matter of law.

834. Under well-established law the entry of false information not material to the authenticity of a document or done with the permission of its maker or his agent does not constitute the crime of forgery (or, therefore, its criminal possession).

835. Therefore, the entry of information on an AAB that the voter has already signed or ostensibly signed is not a forgery, even if that information is false because it does not affect the authenticity of the document; i.e. once it is signed it is the voter's AAB even if it is missing information required for the voter to receive the AB requested thereby.

836. The courts have stated that forgery is the "false making, not making falsely" (or completing) of a document and concerns its authenticity.

837. So, if an AAB is executed or ostensibly executed by a voter, the subsequent entry of false information on it does not constitute a forgery because it has already been authenticated, i.e. it remains the voter's even though it is "completed falsely" after its execution.

838. Conversely, the execution of an AAB after false information has been entered on it is not a forgery. In that scenario, the voter authenticates the AAB as his by signing it even though it is "made falsely" and may constitute a fraud if later used for an improper purpose (e.g. theft of a vote by fraud).

839. Therefore, a voter cannot allege a forgery if he signs a blank AAB that is later completed falsely, anymore than he could if he signs one that already contains false information. In either case, once the AAB is signed by the voter (or ostensible voter) the person who entered false information on it has

"completed falsely" that document, but did not commit a forgery.

840. Trey Smith did or should have known that well-established law.

841. Regardless, he is not entitled to absolute immunity for wrongfully prosecuting McDonough on falsely alleged acts that do not constitute forgeries in excess of the law.

842. As stated, there was no evidence or allegation that McDonough illegally voted any AB or forged any voter signature on any AAB or AB envelope.

843. In truth, McDonough did not handle most of the questioned AB documents.

844. Still, McDonough was wrongfully prosecuted for alleged acts he did not commit that do not constitute the crimes charged, while those others were not prosecuted for the hundreds of AB forgeries they committed even after the wrongful prosecution was exposed.

XXIX. Post-Indictment Acts in Continuation of Scapegoat Prosecution.

845. About a year after his appointment and the expenditure of hundreds of thousands of dollars in fees, costs and laboratory resources, only McDonough and LoPorto were indicted.

846. None of the Dem C/O alleged by Trey Smith in his application for DNA samples to have committed the AB forgery in conspiracy were indicted or prosecuted.

847. To the contrary, Trey Smith: (a) gave immunity, promises of non-prosecution or very favorable treatment to McGrath, DeFiglio, Couch,

Caird, Welch and Aldrich; (b) told Brown, McInerney and Dan Brown they would not be prosecuted; (c) did not investigate Michael Leonard and Richard Mason; and, (d) failed to contact Renna and Martiniano.

848. Upon information and belief, Trey Smith played the role of lead investigator in directing, conducting and participating in his investigation throughout all pre- and post-indictment stages, especially in the questioning of witnesses in an investigatory capacity.

849. Trey Smith continued to pursue the scapegoat prosecution in that capacity and role after McDonough's indictment through two trials.

850. After indictment, Trey Smith publicly pronounced that he "just followed the evidence" in his investigation.

851. However, the record facts prove that Trey Smith, acting in concert and conspiracy with the named defendants, intentionally and maliciously acted to deprive McDonough of his liberty without due process of the law by failing to obtain, ignoring and suppressing evidence sufficient to convict McInerney, Brown, McGrath and the other guilty Dem C/O for the crimes they committed and fabricating and orchestrating the false testimony of McGrath, O'Malley, Ogden, Brown, McInerney, Renna and Robillard to initiate and continue his wrongful indictment, arrest, prosecution and conviction as a scapegoat for alleged acts he did not commit that do not constitute the crimes charged as a matter of state law.

852. It is alleged the record facts prove Trey Smith, in that capacity, did so to avoid the arrest and

prosecution of the Dem C/O who committed serious election crimes.

853. It is also alleged that Trey Smith abused the criminal process by wrongfully obtaining a baseless and grossly over-charged indictment to coerce McDonough into pleading guilty in order to avoid the exorbitant cost of a protracted trial and likely imprisonment with no prospect of the jury hearing the testimony of those who would exonerate him if they did so.

A. *Trey Smith Had No Intention of Prosecuting the Guilty Dem C/O.*

854. On the day of arraignment, during an off-record discussion in chambers, Trey Smith told Court that he did not intend to present any other related matters before a Grand Jury.

855. Trey Smith denied that fact weeks later when McDonough exposed the scapegoat prosecution in a motion to disqualify and dismiss, which caused the supervisory NYSP concern.

856. Still later, the truth of the matter was confirmed when the supervisory NYSP disclosed Trey Smith told them in 2009, 2010 and 2011 that McInerney and Brown could not be prosecuted because the evidence was not sufficient to corroborate accomplice testimony.

857. McInerney and Brown admitted at trial after their ostensible prosecutions were forced in 2011 by the supervisory NYSP who took action in response to McDonough's motion that Trey Smith told them in 2009, 2010 and 2011 they would not be prosecuted.

858. Prior to indictment, Brown's attorney also admitted that fact before retracting it.

B. *Trey Smith and McNally Oppose Request to Have Illegal Appointment Declared Null and Void and County Officials Fail to Take Action.*

859. On February 24, 2011, McDonough moved to disqualify Trey Smith on the same basis of an appearance of impropriety that McNally disqualified himself in September 2009.

860. Trey Smith successfully opposed the motion on the basis that under state law a District Attorney may be disqualified only when the evidence shows an actual prejudice to the moving party or so substantial risk of prejudice that it cannot be ignored.

861. McDonough then took action to have Trey Smith's appointment voided on that same ground and well-established controlling state law.

862. Specifically, by letters dated May 26, 2011 and June 10, 2011 with attached legal brief, *("District Attorney Did Not Establish a Basis for his Disqualification and Therefore the County Court had No Authority to Appoint a Special District Attorney Pursuant to County Law § 701")*, McDonough gave Trey Smith, McNally, The County of Rensselaer and its executive and county officials notice that the disqualification of McNally and appointment of Trey Smith was unlawful, all of his acts were in excess of the legal authority and the jurisdictional lack of state constitutional legal authority could not be cured *nunc pro tunc* by subsequent motion, under clearly established state law. Those letters are incorporated herein by reference.

863. In those letters, McDonough urged the county to commence state court action to nullify Trey Smith's appointment and end the unlawful scapegoat prosecution of McDonough.

864. It is record fact that McNally failed to show legal basis for disqualification on proper written motion as required under well-established controlling state law.

865. Still, Trey Smith by letter dated May 31, 2011, urged the county not to commence an action to have his appointment nullified. That letter is incorporated herein by reference.

866. Thereafter, the county took no action to stop the wrongful prosecution of McDonough despite the dictates of the controlling state law that mandated the relief requested.

867. McDonough had no right under state law to commence a plenary proceeding to have Trey Smith's appointment nullified during a criminal prosecution or to perfect an interlocutory appeal from any adverse ruling on the issue before trial.

868. County officials should have taken that action at the latest when McDonough raised the issue, but they did not.

869. Thereafter, about June 13, 2011, McDonough filed a motion to dismiss the criminal charges on the basis that Trey Smith's appointment was unlawful.

870. Trey Smith and McNally successfully opposed that motion by ignoring well-established state law. The affirmations of McNally and Trey Smith dated July 7, 2011 in opposition to the motion are incorporated herein by reference.

871. The state trial court issued an order denying McDonough's motion in reliance on the arguments and claims of Trey Smith and McNally and in doing so, ignored and failed to follow the law of the case as well as controlling state law.

872. Upon information and belief, Trey Smith and McNally urged the County Attorney to not bring action to declare Trey Smith's appointment invalid and end the prosecution.

873. Consequently, Trey Smith continued the scapegoat prosecution and the county failed to take appropriate action to end it despite notice and knowledge of its unlawfulness.

C. *Improper Extrajudicial "Press Release" Statements with McDonough's Enlarged "Mug Shots" Conspicuously Displayed.*

874. On January 28, 2011, Trey Smith held a highly prejudicial press conference with the NYSP after McDonough's arraignment during which his guilt and the completion of the case was essentially announced. A copy of Trey Smith's written "Press Release" is attached as *Exhibit "H"* and incorporated herein by reference.

875. At his press conference, Trey Smith had an enlarged "mug-shot" of McDonough prominently displayed.

876. At the time, Trey Smith gave a press speech replete with statements likely to impair McDonough's right to a fair trial or made to advance his own personal interests, especially following the months of prosecution-biased media regarding the GJ investigation.

877. Upon information and belief, in making those statements Trey Smith violated applicable provisions of the N.Y.S. Code of Professional Responsibility that prohibited him from making extrajudicial statements that might have impaired McDonough's right to a fair trial or were intended to manipulate the media for the advancement of his own personal interests.

878. In his press statement, Trey Smith essentially publicly announced that McDonough had committed *"massive fraud perpetrated on the citizens"* of the county that deprived all of them of their most fundamental Constitutional right to vote and that he was guilty of the seventy-four (74) forgery related felonies charged.

879. Trey Smith stated, among other things, that: (a) his understanding of the case was first limited to the information produced at the *Lambertsen* hearing; (b) although it was clear that the rights of numerous voters were violated, it was not then clear who was responsible so he called on the NYSP to assist his investigation because of the extent of the fraud,need for investigation and possible forensic examination of evidence; (c) *"[to]gether with the [NYSP], [he] followed this case where the evidence led us. ... and even the evidence of those [elected officials] who have cooperated must be viewed critically in this search for the truth;"* (d) *"While some have admitted very limited responsibility ... not surprisingly no one has come forward to take full responsibility for the massive fraud perpetrated ..."*; (e) *Much of the truth ... was clouded when this investigation began. The hard work, diligence and patience of many have brought a good measure of clarity to the facts"*; (f) Inv. Ogden *"poured over the documentary evidence and discerned*

patterns in that evidence which led to the indictment unsealed today"; (g) *"evidence was presented over the course of six (6) days"*; and (h) all citizens were victimized by the [defendants'] misappropriation of the votes of others, which is a fundamental right of equality, and that anyone who minimizes the crimes thereby trivializes a principle of equality that our Founding Fathers believed to be a fundamental right of all human beings.

D. *Trey Smith Hired Robillard to Give Opinion that Supported False Testimony and To Not Perform Ink Analysis on Dickenson and Thirteen (13) Other Crucial AAB for Payment of One Hundred Thousand Dollars.*

880. On June 10, 2011, Trey Smith moved to compel the handwriting samplers from only McDonough and LoPorto, almost six months after indictment,

881. At the time, the only purported evidence in support of almost all of the charges against McDonough was the false and improper law enforcement opinion testimony of Ogden.

882. Nonetheless, Trey Smith did not seek handwriting samplers from McGrath, McInerney, Brown, Dan Brown or any other Dem C/O alleged in his application for DNA to have committed the AB forgery in conspiracy.

883. Once again, Trey Smith did not obtain the services of a law enforcement Forensic Document Examiner ("FDE") or handwriting expert.

884. Instead, on or about June 2011, Trey Smith retained purported private FDE Robillard to compare McDonough's handwriting with the false

AB Agent and Excuses on the questioned AAB and conduct ink and indentation forensic analysis of them.

885. Notably, a routine computer search at the time of hiring would have revealed that Robillard is identified as *"a paid professional liar for hire"* by one of his peers.

886. A routine computer search at the time would have revealed that Robillard's qualification to testify as an expert was the subject of the U.S. Supreme Court case of *Delaware v. Fensterer,* 474 U.S. 15 (1985) because he gave an opinion in support of a prosecution theory without being able to recall the scientific method he used to come to that conclusion.

887. A routine computer search at the time would have also revealed that Robillard was a supervisor of the FBI crime laboratory DNA Unit before its reorganization following highly-publicized investigations by the government concerning alleged improper hair and fiber, ballistics and other forensic laboratory services during which it was reported he admitted to ordering a subordinate to destroy the results of proficiency tests that were all substandard.

888. On September 26, 2011, McDonough gave handwriting samplers to Robillard.

889. However, the record facts prove that Robillard essentially became part of the prosecution team and acted closely with Trey Smith and Ogden to formulate purported opinion and indentation "evidence" in support of the their prosecution theory against McDonough.

890. Relevant letters and records prove that Trey Smith essentially told Robillard what findings and

opinions were needed to support every count of the indictment, witness testimony and purported prosecution theory against McDonough. A copy of Trey Smith's self-explanatory letter of July 22, 2011 which shows the same is attached as *Exhibit "I"* and incorporated herein.

891. The record facts prove Trey Smith did not request Robillard to perform a handwriting comparison concerning the AAB in accordance with the established standards of forensic practice to ensure a proper, objective handwriting and forensic examination of the AAB.

892. To the contrary, Trey Smith provided Robillard a copy of the indictment and a summary of what he called the "evidence" against McDonough related to each count thereof.

893. Trey Smith and Ogden told Robillard the theory of the prosecution and what AB Agent and Excuses were alleged to be false and have been written by McDonough.

894. Later, after the prosecutions of McInerney, Brown and Renna were forced by the supervisory NYSP, Trey Smith gave Robillard charts explaining AAB entry each Dem C/O admitted they made or alleged was written by McDonough by count of the indictment.

895. Trey Smith effectively gave Robillard the answers to the questions and paid him to give the opinion "needed" to support the theory of prosecution and the fabricated false testimony of McGrath, O'Malley, Brown and others.

896. On December 9, 2011, about five weeks before trial, Trey Smith disclosed the purported report of

the analysis of handwriting comparison by Robillard, dated December 1, 2011, in which he essentially gave the opinion that McDonough wrote the AB Agents and Excuses on almost all of the AAB for which he stood indicted.

897. In his report, Robillard gave the opinion that essentially all of the false AB Agent and Excuses on the questioned AAB were written by McDonough.

898. Robillard was paid approximately one-hundred thousand ($100,000.00) dollars for his handwriting comparison, ink and indentation analysis, report and opinion testimony before another Grand Jury and the trials of McDonough,

899. The disclosure provided was limited to the report of the expert and did not include any raw data, procedures utilized, standards applied or other documents regarding the matter. Trey Smith disclosed that voluminous information on the eve of trial after denying requests for its earlier disclosure and the curriculum vitae of Robillard.

900. Not surprisingly, Robillard's report supported the preposterous prosecution theory and Ogden's improper false opinion testimony before the Grand Jury in all material respects.

901. However, McDonough did not write the AB Agent and Excuses on all of these AAB and the handwriting on many of them does not appear to match his known samples or the ones Robillard dictated he write in faster than his normal writing speed when given.

902. In fact, as discussed below, Robillard, Ogden and Trey Smith purposely did not perform a relatively quick and inexpensive ink analysis on

those fourteen (14) AAB that McInerney, DeFiglio and Galuski obtained before September 10, 2009 that Brown, Dan Brown or another Dem C/O possessed and filed on September 10, 2009 and were completed entirely in the same ink because that evidence alone would have exonerated McDonough, disproved the prosecution theory and proved the falsity of the testimony of Robillard, Ogden and McGrath.

903. Upon information and belief, on or about June or July 2011, Robillard agreed and conspired with Ogden and Trey Smith to give fabricated false and improper forensic expert opinion testimony in furtherance of the conspiratorial scapegoat prosecution.

XXX. McDonough Exposed Scapegoat Prosecution in Post-Indictment Motion. Martiniano Disclosed Further Evidence of Scapegoat Prosecution.

904. On February 24, 2011, McDonough filed a motion to disqualify Trey Smith and dismiss the indictment in which he exposed the conspiratorial scapegoat prosecution to protect the guilty Dem C/O from prosecution, essentially by stating those record facts then known.

905. McDonough's motion was reported in the local news media and caused the scheme to scapegoat McDonough to begin to unravel.

906. At various times thereafter, Trey Smith gave patently incredible excuses for his conduct and attacked all who questioned it.

907. The record facts show that thereafter Trey Smith variously claimed, among other things, that: (a) Martiniano and Renna were mistakenly not

interviewed, not credible or refused to give statements; (b) admissible evidence was missed by mistake or rejected because it concerned matters beyond his authority; (c) McDonough's attorney was a liar, committed perjury and controlled an FBI Special Agent; (d) he had "trust issues" with the FBI Agent conducting an investigation into McDonough's complaint of scapegoat prosecution and claimed that agent had character flaws and engaged in misconduct to end the prosecution; (e) BOE employees Bugbee and Sweeney were complicit in McDonough's alleged crimes; and, (f) Sr. Inv. O'Brien had engaged in misconduct, been disciplined and forced to retire.

A. *Martiniano Disclosed Admissions Made by Brown and McInerney and McNally's Advice to Him Not to Come Forward.*

908. The next day, on February 25, 2011, Martiniano came forward and disclosed in a sworn statement to a private investigator that the NYSP never interviewed him, Brown and McInerney told him they were going to use the AAB gathered on September 14, 2009 to forge signatures onto AB envelopes and McNally told him that he should not contact the NYSP or Trey Smith and disclose the facts he knew about the matter because *"it will all be over soon."*

909. Immediately, Trey Smith publicly impugned Martiniano's credibility and integrity in the news reports and court papers.

910. At the same time, Brown publicly called Martiniano a liar and denied any guilt during a press

conference, but Brown's comments were proven to be lies.

911. Martiniano's statements later proved to be true.

912. Still, Trey Smith later called Martiniano as a witness at trial only to impeach him.

913. Trey Smith took no action against McInerney or Brown with that new evidence.

914. Similarly, when McDonough in an affidavit filed with the court disclosed the facts of September 24, 2009 which incriminated Brown and McInerney, Trey Smith essentially defended Brown and McInerney in a memo to Ogen dated February 28, 2011, with the following comment: *"I think we have already established that he has a credibility problem; I what find really interesting is how he is now really blowing in not just McInerney, but John Brown as well."*

915. Upon information and belief, many of the voluminous memorandum, letter, emails and other records maintained by Trey Smith and the NYSP concerning Trey Smith's investigation contain contradictory and inconsistent statements and other comments made by Trey Smith and Ogden that evidence the alleged conspiracy and its objectives.

B. *McDonough and Newspaper Reporter Discovered Move Evidence of the Guilt of McInerney and Renna That Trey Smith and Ogden Once Again Ignored.*

916. After indictment, McDonough reviewed numerous AAB on file at the BOE and found nineteen (19) filed in the 2007 general election on

which McInerney was the AB Agent, all of which also appeared to have been completed in the same distinct handwriting as the registration card of McInerney and his mother Shirley McInerney.

917. At that time, McDonough also found thirty-seven (37) AAB filed in the 2008 elections that were completed in McInerney's handwriting and he was the AB Agent on them.

918. Many of those 2007 and 2008 also had similarly stated vacation Excuses.

919. As stated, in 2010 Bugbee gave Trey Smith many of those 2007 and 2008 AAB.

920. Trey Smith told Bugbee that the NYSP was not interested in past AB forgery and he did not have the authority to prosecute those crimes.

921. On or about 2011 but prior to indictment, McDonough's counsel provided many of those same AAB to Trey Smith and was given the same response.

922. Notably, the office of district attorney was the most significant local election in 2007 and it was determined by only a slight margin.

923. None of those 2007 and 2008 AAB were completed by McDonough or Bugbee.

924. At that time, however, a Troy Record newspaper reporter needed only to approach three of those voters to discover from them that their AAB had false information and signatures.

That newspaper's related March 7, 2011 article is incorporated by reference.

XXXI. NYSP Learned Trey Smith Lied About McInerney and Brown. NYSP and FBI Commenced Investigations without Trey Smith's Knowledge. NYSP and FBI Interview McDonough without Trey Smith's Knowledge. Trey Smith Quashes Federal Investigation. McInerney Forced to Enter Into Favorable Cooperation Agreement.

A. *Supervisory NYSP Questioned Trey Smith's Conduct.*

925. Upon information and belief, Sr. Inv. O'Brien began to question Trey Smith's actions in the fall of 2009 when it became apparent he focused his investigation on McDonough.

926. As stated, at the time, Trey Smith told the supervisory NYSP that McInerney and Brown could not be prosecuted due to lack of evidence to corroborate accomplice testimony.

927. Upon information and belief, once McDonough exposed the falsity of that statement and other relevant facts in his post-indictment motion, the supervisory NYSP again had concerns about the investigation, prosecution and Trey Smith's conduct.

928. Upon information and belief, the supervisory NYSP then began to take action to conduct a proper investigation and prosecution of the AB forgery.

B. *McDonough Made Complaint about Criminal Violation of Federal Civil Rights. FBI Assigned to Investigate Scapegoat Prosecution and/or Past AB Forgery.*

929. On or about April 2011, McDonough contacted the U.S. Attorney's Office through, counsel and

requested an FBI investigation into the criminal violation of his civil rights by the unlawful prosecution and the decades of AB forgery DeFiglio disclosed to Trey Smith.

930. In response, on or about May 2011, the FBI, through an agent in the public corruption unit, began to investigate McDonough's complaint and past AB forgery.

931. It is known that FBI Special Agent McDonald was assigned to conduct that investigation at the request of the US Attorney's Office.

C. Trey Smith Acted to Derail FBI Investigation

932. Upon information and belief, on or about April 26, 2011, Trey Smith learned from a news reporter that the FBI was conducting a federal investigation concerning the matter.

933. Trey Smith immediately sent letters to the U.S. Attorney Office and FBI dated April 27, 2011 and April 28, 2011, respectively.

934. Those letters show that Trey Smith was concerned about an FBI investigation because it would discredit his work and for other reasons discussed. See, Exhibit A.

935. Trey Smith publicly stated that he welcomed a federal investigation or take-over of the matter and sought that assistance in the past but it was declined

936. Upon information and belief, however, Trey Smith took action to derail it.

937. Upon information and belief, Trey Smith leaked to the newspapers variously that there was no federal investigation, the U.S. Attorney confirmed there was no investigation, he was aware of the FBI

investigation, and the FBI was assisting the NYSP in his investigation.

938. Upon information and belief, Trey Smith falsely told Bugbee that he was working in conjunction with the NYSP, FBI and U.S. Attorney's Office in investigating the AB forgery.

939. Upon information and belief, Trey Smith leaked the name of the FBI agent conducting the investigation to impair his ability to get witnesses or suspects to talk to him.

940. Trey Smith leaked information to the news media that impaired the federal investigation and blamed the FBI Special Agent for doing it, but then admitted he did it.

941. Upon information and belief, at all times relevant, Trey Smith acted to keep his co-conspirators from cooperating with the FBI and disclosing the scapegoat prosecution.

D. *Supervisory NYSP Learned Trey Smith's Assertion that McInerney and Brown Could Not Be Prosecuted was False. NYSP Began Independent Investigation to Ensure Their Arrest and Prosecution.*

942. Upon information and belief, on or about May 21, 2009 or soon thereafter, the FBI also confirmed that Trey Smith's statement to the NYSP that McInerney and Brown could not be prosecuted was not true because, in fact, the voter testimony and forged AB documents were sufficient to corroborate the testimony of any accomplice, especially DeFiglio.

943. Upon information and belief, on or about May 25, 2011, the supervisory NYSP began to conduct an

independent investigation of McInerney without the knowledge of Trey Smith due to their frustration, concern, dissatisfaction and lack of trust in him.

944. Upon information and belief, from on or about May 25, 2011 until on or about August 4, 2011, the supervisory NYSP directed a rudimentary investigation that led to overwhelming proof of the guilt of McInerney, Brown and Renna.

945. The NYSP obtained that evidence by simple investigation and without the need for costly DNA or forensic expert services.

946. That evidence consisted of the same known and easily discoverable testimony and AB documents that Trey Smith ignored or purposely did not obtain throughout.

947. The NYSP gathered AAB, BOE records and statements from witnesses, including Suozzo that was sufficient to convict McInerney for the forgery of about fifty (50) AAB that appeared to have been entirely forged in his handwriting. Those AAB, BOE records and statements are incorporated herein by reference.

F. *Sr. Inv. O'Brien and FBI Interviewed McDonough without Trey Smith's Prior Knowledge on June 1, 2011.*

948. Upon information and belief, at the same time that Trey Smith took action to derail the FBI investigation, Sr. Inv. O'Brien sought the assistance of the FBI and, it is believed, looked for the federal authorities to take the case over.

949. Consequently, On May 27, 2011, the FBI requested McDonough to meet with the FBI and Sr. Inv. O'Brien at the FBI building to be interviewed.

950. On June 1, 2011, McDonough met with Sr. Inv. O'Brien and FBI at their request and was interviewed about the unlawful prosecution and Ms knowledge of the activities of the Dem C/O related to the AB forgery.

951. Sr. Inv. O'Brien expressly conditioned the meeting upon McDonough's agreement not to disclose it to Trey Smith or any person until the NYSP task was completed.

952. Trey Smith had no knowledge about that meeting until Ogden informed him of it on or about August 2, 2011.

953. McDonough was informed at that time that the supervisory NYSP were aware that Trey Smith did not properly investigate or prosecute the matter.

954. Obviously, the meeting would never have taken place if the NYSP supervisory personnel had confidence and trust in Trey Smith's investigation and related conduct.

955. Its occurrence alone is beyond extraordinary and speaks volumes.

956. the NYSP later again showed its lack of confidence and trust in Trey Smith's investigation and conduct by arresting McInerney without his prior knowledge.

G. Trey Smith Meets with U.S. Attorney Office and FBI. Declared Had Trust Issues with FBI Agent and Quashed Independent FBI Investigation on June 2, 2011.

957. On June 2, 2011, Trey Smith met with the FBI, U.S. Attorney's Office and NYSP.

958. Upon information and belief, Trey Smith demanded that meeting purportedly for the primary reason of discussing a coordination of federal and state investigations into the AB forgery and, especially, the prospect of offering McInerney a cooperation agreement.

959. Upon information and belief, however, Trey Smith actually then sought to quash the federal investigation and did so at that time.

960. Upon information and belief, at that meeting, although Trey Smith claimed that he welcomed a federal investigation he stated that he had "trust issues" with the FBI Agent conducting it because he had commenced an investigation, interviewed McDonough's attorney and interviewed DeFiglio and other witnesses without his knowledge.

961. Upon information and belief, at that meeting, Ogden also expressed concern that if the FBI interviewed witnesses or subjects and gave cooperation agreements it might impair Trey Smith's (NYSP) investigation.

962. Upon information and belief, at that meeting, the FBI told Trey Smith that the attorneys for several suspects said their clients did not trust Smith.

963. Upon information and belief, in fact, Sr. Inv. O'Brien did not trust Trey Smith and the supervisory NYSP were dissatisfied with his investigation and prosecution of the matter.

964. At that meeting, Trey Smith was required to admit that there was more than enough corroboration to prosecute and convict McInerney, Brown and others.

965. At that meeting, Trey Smith indicated that his investigation would be done soon.

966. However, at that time, Trey Smith also quashed the independent FBI investigation into McDonough's complaint of public corruption by requesting that it no longer actively investigate the matter independently but merely coordinate and assist the NYSP. A copy of unclassified but redacted FBI reports dated June 3, 2011 (3 pages), June 9, 2011 (2 pages), June 13, 2011 (1 page), July 20, 2011 (1 page) and August 5, 2011 (1 page) that confirm the above facts are attached as *Exhibit "J"* and incorporated herein by reference.

967. Thereafter, Trey Smith continued to tell the supervisory NYSP that the arrest and prosecution of McInerney, Brown and others was imminent.

968. Upon information and belief, however, once Trey Smith realized that Sr. Inv. O'Brien was aware he had lied about not being able to prosecute McInerney and Brown and that it was inevitable they were going to be arrested, he made arrangements for McInerney to plead guilty on or about July 15, 2011, to an SCI charging a felony (or misdemeanor) in satisfaction of all charges that could be filed before any cooperation was provided.

969. Thus, Trey Smith attempted to feign incompetence or poor exercise of judgment by giving McInerney the same immunity with impunity that he gave McGrath.

970. However, Sr. Inv. O'Brien prevented that disposition.

H. *McInerney Entered Cooperation Agreement on July 22, 2011*

971. Thereafter, on July 22, 2011, Trey Smith gave McInerney a cooperation agreement pursuant to which he was required to provide complete truthful cooperation in return for a plea of guilty to one felony and ninety-day work order in satisfaction of all charges related to the 2009 AB forgery, without the waiver of the right to appeal.

972. Upon information and belief, however, McInerney would not agree to provide the required cooperation unless the NYSP and FBI agreed not to pursue his arrest or prosecution for any of the AB forgery he committed in past years, especially 2007.

973. Upon information and belief, the supervisory NYSP and FBI would not agree to abide by the terms of McInerney's cooperation agreement unless he was fully debriefed and it was determined that his information was complete, truthful and accurate.

974. Upon information and belief, Trey Smith and McInerney continued to postpone any debriefing because they knew that McInerney could not tell the truth without disclosing the conspiracy to scapegoat prosecute McDonough and incriminate all those involved in the AB forgery, conspiracy and the cover-up of them.

I. *Trey Smith Told That FBI Interviewed McDonough without His Knowledge Trey Smith Sent Email to Ogden Attacking FBI Agent, Defense Attorney and Implying that McNally*

May Have Committed AB Forgery with McInerney.

975. Upon information and belief, on August 2, 2011, FBI Agent McDonald told Trey Smith, with agreement of Sr. Inv O'Brien, that the proposed plea bargain was not satisfactory, proper criminal justice procedure required McInerney to provide complete, truthful information about any crimes he may have committed before he received any consideration regarding his arrest, prosecution or sentencing, including any AB forgery he committed in 2007 or 2008.

976. Upon information and belief, the supervisory NYSP and FBI knew that they already had obtained and could gather more evidence to convict McInerney of many AB forgery and other serious elections crimes he committed in 2007 and 2008.

977. Upon information and belief, Trey Smith also staged a confrontation with FBI Special Agent McDonald at a scheduled initial debriefing of McInerney held on or about August 2, 2011, so that it abruptly ended and he had time to take action to derail the federal investigation, protect McInerney from prosecution for elections crimes committed in 2007 and 2008 and continue the wrongful prosecution of McDonough.

978. Upon information and belief, on August 2, 2011, Ogden told Trey Smith that the FBI had already interviewed McDonough without his knowledge.

979. As a result, on August 3, 2011, at 5:06 a.m., Trey Smith sent an email to Ogden in which he postulated a conspiracy theory that ironically applies

to the scapegoat prosecution and transposed baseless and absurd allegations of criminal and/or unethical conduct upon FBI Agent McDonald, McDonough and his attorney. A copy of Trey Smith's email is attached as *Exhibit "K"* and incorporated herein.

980. Upon information and belief, Trey Smith succumbed to the pressure of continuing the scapegoat prosecution, the cover-up and the protection of McInerney and others.

981. Upon information and belief, in his panic, Trey Smith may have provided the actual reason for the scapegoat prosecution and its cover-up by stating: "I *would assume that McDonough ... implicated McNally in a conspiracy with McInerney to win the DA's race in 2007. All McDonough would have to do is say that he overheard, [them] discussing [it], and that would be sufficient for the Feds to bring conspiracy allegations against McNally. I also assume that presently McDonald [sic] has nothing to corroborate McDonongh 's allegations. "*

982. In his memo, Trey Smith essentially told Ogden and Fancher they had to decide where they stood concerning their investigation and impugned the integrity of the FBI agent who sought to obtain McInerney's complete truthful information before being immunized by stating that he was a *"willing instrument"* of defense counsel and *"very strange individual"* who *"suffered from a number of defects, notably judgment and ambition."*

983. Upon information and belief, Trey Smith was doing all he could to prevent McInerney from telling the truth by giving him the same deal he gave McGrath; i.e. immunity with impunity before he

gave any information that in ipso factor breach of the cooperation agreement that would never be rescinded or enforced. And, that is precisely what they later did.

984. Later, to continue the wrongful prosecution, Trey Smith falsely told the trial court that he had prior knowledge of the NYSP and FBI interview of McDonough and had directed Sr. Inv. O'Brien to ask specific questions but he purposely did not when, in truth, Trey Smith had no prior knowledge of the meeting which was conditioned upon its non-disclosure to him.

985. During the trial, Trey Smith accused Sr. Inv. O'Brien of misconduct related to another NYSP investigation and was forced to retire.

986. In any event, McInerney had not provided any cooperation by August 5, 2011.

987. Therefore, on or about August 5, 2011, a NYSP Captain told the FBI that the NYSP would no longer wait for Trey Smith to make decisions concerning the prosecution of McInerney and others before it took its own action. See, FBI Reports, Exhibit J, above.

J. McDonough Gave NYSP AAB that Proved Renna Forged AAB for Testa.

988. In that regard, after McDonough was wrongfully indicted for the forged Testa AAB, he discovered that the distinctive handwriting on that AAB also appeared to be on other AAB and party enrollment cards for 2007 and 2008 that were released to, or filed by, Renna.

989. McDonough provided copies of about five (5) of those applications to the FBI and NYSP when they met in July 2011.

990. Later in 2011, McDonough's counsel gave the supervisory NYSP copies of fifteen (15) other AAB filed in 2007 that also appeared to be fully or partially completed in the same handwriting that appeared to be on the Testa AAB.

991. Upon information and belief, the NYSP then easily obtained evidence sufficient to convict Renna for the forgery of those documents, including the Testa AAB, without the need for forensic or DNA evidence.

992. Upon information and belief, the NYSP also obtained the depositions and forged AAB of voters DeFabio, Tangredi and Petit that alone was sufficient evidence to convict Brown.

XXXII. Supervisory NYSP Independent Investigation Led to Arrest of McInerney and Imminent Arrest of Brown and Renna without Trey Smith's Knowledge.

993. Consequently, on August 8, 2011, the supervisory NYSP arrested McInerney on several felony complaints for AB forgeries he committed in 2008 and/or 2007, The related accusatory instruments are incorporated herein by reference.

994. At that time, the supervisory NYSP also told Trey Smith that the arrest of Brown and Renna was imminent.

995. Trey Smith did not hold a press conference to publicly disgrace or announce the conviction of the most prolific AB forger in county history.

996. Trey Smith did not indict McInerney on even only dozens of the easily provable hundreds of AB forgery crimes he committed, or seek his imprisonment.

997. Instead, Trey Smith quietly arranged his guilty plea to one felony *which he initially* publicly denied was a jurisdictionally defective conviction and proffered a fallacious argument in court papers for its validity, but then admitted the defect in communications with the NYSP. Those papers related to that matter are incorporated herein by reference.

XXXIII. Trey Smith's Actions to Continue Prosecution and Cover-up Conspiracy.

998. Upon information and belief, as a result of the FBI and supervisory NYSP actions Trey Smith was no longer able to keep his promise not to prosecute McInerney and Brown.

999. Upon information and belief, at all times while the NYSP and FBI conducted their own investigations, Trey Smith took action to continue the scapegoat prosecution, cover-up the conspiracy and protect McInerney, Brown and Renna from meaningfully prosecution and, especially, keep them from telling the truth that would have exonerated McDonough and further exposed their conspiracy to scapegoat prosecute him.

1000. Upon information and belief, there is no other plausible explanation for the otherwise inexplicable later conduct of Trey Smith, McInerney, Brown and Renna, as discussed.

A. *McNally Disqualify Himself and Trey Smith Obtained an Order Extending His Authority to*

Protect McInerney from Prosecution for 2007 and 2008 Crimes.

1001. In reaction to the NYSP arrest of McInerney, in July 2011, more than a year after telling Bugbee and McDonough's attorney that he could not do so, Trey Smith perfunctorily had McNally again disqualify himself without written motion or legal basis and obtained an Order extending his authority to prosecute McInerney for the AB forgery he committed in 2007 and 2008. The relevant letters of Trey Smith and McNally to the court dated July 18, 2011, and July 19, 2011, respectively, are incorporated herein by reference.

B. *Trey Smith Interviewed McInerney without the NYSP or FBI Present*

1002. Upon information and belief, for a period of time thereafter, Trey Smith and McInerney's attorney told the supervisory NYSP that McInerney would schedule a meeting to provide complete truthful information to the NYSP and FBI prior to his guilty plea.

1003. Upon information and belief, however, Trey Smith misled the supervisory NYSP for a period of time so that he could meet with McInerney and fabricate his false statement.

1004. Upon information and belief, on a number of occasions, Trey Smith met with McInerney for hours without the knowledge of the supervisory NYSP or FBI and "went over" the purported cooperation he was going to provide.

XXXIV. Fabricated False Statements of McInerney, Brown and Renna.

A. *Trey Smith Fabricated McInerney's False Statement to Continue Prosecution.*

1005. Thereafter, when the NYSP and FBI finally met with McInerney to obtain his cooperation, Trey Smith announced that he had already done so.

1006. Upon information and belief, Sr. Inv. O'Brien and the FBI present had reasonable cause to believe that McInerney's purported cooperation was not complete or truthful.

1007. Upon information and belief, Sr. Inv. Ogden had reasonable cause to believe that the information McInerney gave was materially false and previously fabricated with Trey Smith.

1008. Upon information and belief, Trey Smith allowed McInerney to prepare his sworn written statement over a period of time with the assistance of his attorney and/or Trey Smith. The statements that were drafted and/or signed by McInerney and any related correspondence is incorporated herein by reference.

1009. Upon information and belief, Trey Smith fabricated the false statement of McInerney to ensure that he would not tell the truth or provide complete information about all the relevant facts but, instead to be as consistent as possible with other false testimony fabricated against McDonough, support the prosecution theory and continue the scapegoat prosecution.

1010. Upon information and belief, McInerney gave his false statement in furtherance of the wrongful prosecution of McDonough and to cover-up the conspiracy.

1011. Upon information and belief, McInerney did not tell the truth about the AB forgery because it would have exonerated McDonough, proven the guilt of all the Dem C/O for the AB forgery and/or perjury and proven the conspiratorial scapegoat prosecution.

1012. Upon information and belief, McInerney intentionally failed to exonerate McDonough, fully incriminate the Dem C/O who committed the AB forgery in conspiracy with him or admit that the AB forgery was committed by the Dem C/O acting in conspiracy.

1013. In particular, McInerney denied having forged the AB documents of Suozzo even though he did so then in conspiracy with the other Dem C/O as well as in the past and was the only person to ever have had any contact with him.

1014. At trial, Suozzo also essentially testified that he was recruited by McInerney to vote by AB and he had contacted him in the past, but not in 2009.

1015. Upon information and belief, McInerney forged the Suozzo AAB in conspiracy with other Dem C/O, knew who had written false information on it and thereafter forged his AB.

1016. Upon information and belief, however, Trey Smith "needed" McInerney to tell the fabricated falsehood that he did not forge the Suozzo AB because McDonough's DNA was allegedly found on it and his false testimony allowed for an inference in support the prosecution theory that it was forged by McDonough at the BOE.

1017. On the other hand, if McInerney told the truth it would have completely debunked the prosecution theory and itself exonerate McDonough.

1018. Among other false statements, McInerney falsely incriminated McDonough by saying that he gave McDonough the names of several voters, including Robertson, to falsely vote and that he was *"certain that those AB never left the BOE, and that they were forged by McDonough while in his office."* Ogden's memo dated November 1, 2011 to the supervisor of the NYSP lab confirming the same is incorporated herein by reference.

1019. At the time, McInerney also did not admit that he had helped Jermaine Joseph and Donnell Paterson, two Hudson Valley College students, establish city residency so they could get reduced tuitions, paid them to enroll in the WFP in 2009 and forged their AB documents.

1020. McDonough and O'Malley had no knowledge about those facts at anytime. B. *Trey Smith Fabricated Renna's False Statements to Continue Prosecution.*

1021. Upon information and belief, on or about September 20, 2011, and October 18, 2011, Renna was interviewed by Ogden and Fancher.

1022. Thereafter, Renna gave sworn written depositions on October 20, 2011, and November 9, 2011. Renna's two depositions are incorporated herein by reference.

1023. In his October 20, 2011 deposition, Renna confirmed that he admitted to having forged the Testa AAB in 2009 because McInerney asked him to help *"get votes."*

1024. In his October 20, 2011 deposition, Renna also confirmed that he admitted to having forged at least eleven (11) AAB in the 2007 general election.

1025. In his October 20, 2011 deposition, Renna stated that he almost always gave the AAB that he filed at the BOE to McDonough or Mary Sweeney because he *"knew they would not be questioned"* but admitted that he never discussed forging AB or AAB with anyone or witnessed anyone forge them in his presence.

1026. Therefore, it is clear that Renna was asked specifically about McDonough.

1027. In his November 9, 2011, deposition Renna admitted that he knew voter Robertson and entirely forged her AAB and AB.

1028. In that deposition, Renna also stated that he was "relatively certain that [he] completed [] Testa's [AB] while [he] was in [] McDonough's office ... [McDonough] was in the office when [he] voted the [AB]" and did not recall completing the Robertson AB at that time but looking at the documents it appears that he completed the AB for each of those voters then.

1029. Upon information and belief, on one or more occasions prior to November 9, 2011, and thereafter, Trey Smith directly and/or indirectly through McInerney and/or others acted in conceit and conspiracy with Renna to fabricate the false statements and testimony he gave on October 20, 2011 and thereafter to incriminate McDonough in support of the prosecution theory and continuation of Ms wrongful prosecution and conviction.

1030. Upon information and belief, prior to December 5, 2011, Renna was, in fact, represented in the negotiation of his cooperation agreement and plea bargain by McInerney's attorney or an attorney from his office.

1031. Upon information and belief, subsequent to September 20, 2011, Smith and McInerney's attorney engaged in plea negotiations on behalf of Renna.

1032. Upon information and belief, on one or more occasions prior to November 9, 2011, and at times thereafter, Trey Smith met with Renna to fabricated his false testimony.

1033. On December 5, 2011, Renna executed a cooperation agreement pursuant to which he was required to provide complete truthful cooperation in return for a plea of guilty to one felony and sentenced of two hundred (200) hours community service in satisfaction of his 2009 AB forgery. Renna's cooperation agreement is incorporated herein by reference.

1034. Thereafter, on or about December 6, 2011, Renna testified before a Grand Jury considering charges against Galuski, Campana and Brown and gave additional fabricated false testimony against McDonough.

1035. At the Grand Jury, Renna falsely testified that he entirely forged the AAB and AB of Testa and Robertson on September 14, 2009, in front of McDonough while in his office and that he trace forged the voter signatures from registration cards McDonough gave him. Renna's relevant Grand Jury testimony is incorporated herein by reference.

1036. In truth, Renna knew that McDonough had only handled the Testa and Robertson AB documents in assisting him at the counter when he filed their AAB.

1037. That fact also explains why Trey Smith was so persistent in having the NYSP lab use new and "better" methods to test for the presence of DNA on those specific AB envelopes.

1038. However, certain NYSP memos show that although McInerney and Renna were obviously acting in concert and conspiracy with Trey Smith to continue the wrongful prosecution of McDonough through their fabricated testimony, they could not keep the false stories straight.

1039. Thus, for example, in a November 1, 2011 memo to the supervisor of the NYSP lab, Ogden said that McInerney told him that he gave the name of several voters, including Robertson, to McDonough for AB voting and that he was *"certain that those AB never left the BOE, and that they were forged by McDonough while in his office."*

1040. Yet, in a December 26, 2011 memo to the lab supervisor, Ogden stated that Renna told him that *"he had forged the ballot inside [the Robertson AB envelope]."* Those emails are incorporated herein by reference.

1041. Those record facts make it clear that Trey Smith, McInerney and Renna fabricated false testimony against McDonough in furtherance of their conspiracy, but also failed to get their stories straight quickly enough under the pressure of the actions of the supervisory NYSP.

1042. It is also clear from the record facts that the inference Trey Smith intended to have drawn from the fabricated false testimony of McInerney and Renna was that the Suozzo, Robertson and Testa AB envelopes, and, therefore, all the AAB in question, were forged by McDonough in the BOE "forgery factory."

1043. Again, voters Robertson and Testa were not public housing residents and there never would have been anything to connect Renna to the forgery of their AB envelopes or his involvement in said AB forgeries if McDonough and the supervisory NYSP did not force his prosecution because Trey Smith and Ogden coincidentally "missed" him during their investigation (as they did Martiniano).

1044. Similarly, voter Suozzo was not a public housing voter and if McInerney was not prosecuted as promised he would never have talked about that forged AB.

1045. However, as discussed, that orchestration and fabrication of false evidence was ruined by McDonough when he discovered that the Testa and Robertson AAB were forged entirely in Renna's handwriting and Suozzo's 2008 and 2007 AAB had been forged in McInerney's handwriting, which led Sr. Inv. O'Brien to force their prosecutions.

1046. Upon information and belief, Trey Smith fabricated the false statement and testimony of Renna to not tell the truth or provide complete information about all the relevant facts, but instead to be as consistent as possible with other false testimony fabricated against McDonough, support

the prosecution theory and continue the scapegoat prosecution.

1047. Upon information and belief, Renna gave his false statement and testimony in furtherance of the wrongful prosecution of McDonough and to cover-up the conspiracy.

1048. Upon information and belief, Renna intentionally gave materially false information about the AB forgery in his statement in order to continue the scapegoat prosecution.

1049. Upon information and belief, Renna did not tell the truth about the AB forgery because it would have exonerated McDonough, proven the guilt of all the Dem C/O for the AB forgery and/or perjury and proven the conspiratorial scapegoat prosecution.

1050. Upon information and belief, Renna intentionally failed to exonerate McDonough, fully incriminate the Dem C/ O who committed the AB forgery in conspiracy with him or admit that the AB forgery was committed by the Dem C/ O acting in conspiracy.

C. *Trey Smith Fabricated Brown's False Statements to Continue Prosecution.*

1051. Upon information and belief, Trey Smith was forced by the action of McDonough, the supervisory NYSP and FBI to begin Grand Jury proceedings against Galuski and Campana in the fall of 2011.

1052. Upon information and belief, Trey Smith leaked to local newspapers that he was also presenting a case against Brown at the same time.

1053. Upon information and belief, Brown testified before the Grand Jury with counsel pursuant to a waiver of immunity on October 27, 2011 and December 14, 2011.

1054. Upon information and belief, Brown's appearance before the Grand Jury was a ruse because the supervisory NYSP were already aware that Brown forged the AB documents of DeFabio, Tangredi and Petit that was sufficient to convict him.

1055. The NYSP obtained affidavits from DeFabio and Tangredi on or about December 2, 2011, after Brown testified before the Grand Jury on October 27, 2011.

1056. Upon information and belief, on December 6, 2011, Brown executed a cooperation agreement pursuant to which he was required to provide complete truthful cooperation in return for a plea of guilty to one felony and be sentenced solely in discretion of the Court with Trey Smith's recommendation of up to six months incarceration and five years probation in full satisfaction of his 2009 AB forgery and perjury. Brown's cooperation agreement is incorporated herein by reference.

1057. On that same day, Brown gave a sworn written deposition, Brown's deposition is incorporated herein by reference.

1058. In his deposition and before the Grand Jury, Brown gave fabricated false testimony about what happened in McDonough's office on September 14, 2009 that was consistent with the false Grand Jury testimony of McGrath and O'Malley.

1059. In particular, Brown falsely stated in his deposition that: (a) he saw McGrath gave

McDonough an AAB and what seemed to be a false Excuse for an older voter and McDonough then wrote information on that AAB; (b) he was in McDonough's office for about forty (40) minutes during which he saw the AAB he brought to the BOE sitting on McDonough's desk; (c) he saw McDonough writing on documents but could not say for sure that they were those AAB; and, (d) he saw O'Malley come in and out of the office but did not recall him sitting at a desk or writing on any AAB.

1060. Brown's false testimony was essentially consistent with the false testimony of McGrath and O'Malley in support the prosecution theory that McDonough falsely completed all the AAB Brown filed that day, but it was otherwise materially contradictory.

1061. Upon information and belief, on one or more occasions prior to December 6, 2011, and at times thereafter, Trey Smith met with Brown to fabricated his false testimony.

1062. Upon information and belief, Trey Smith fabricated the false statement and testimony of Brown to not tell the truth or provide complete information about all the relevant facts, but instead to be as consistent as possible with other false testimony fabricated against McDonough, support the prosecution theory and continue the scapegoat prosecution.

1063. Upon information and belief, Brown gave his false statement and testimony in furtherance of the wrongful prosecution of McDonough and to cover-up the conspiracy.

1064. Upon information and belief, Brown intentionally gave materially false information about the AB forgery in his statement in order to continue the scapegoat prosecution.

1065. Upon information and belief, Brown did not tell the truth about the AB forgery because it would have exonerated McDonough, proven the guilt of all the Dem C/O for the AB forgery and/or perjury and proven the conspiratorial scapegoat prosecution.

1066. Upon information and belief, Brown intentionally failed to exonerate McDonough, fully incriminate the Dem C/ O who committed the AB forgery in conspiracy with him or admit that the AB forgery was committed by the Dem C/ O acting in conspiracy.

XXXV. Fabricated False Complaint Made Against Sr. Inv. O'Brien. Trey Smith Questioned Sr. Inv. O'Brien re FBI Investigation. Trey Smith Asked if FBI "Bugged His Office" or Tapped His Telephones.

1067. Upon information and belief, sometime after Trey Smith learned that the FBI and Sr. Inv. O'Brien interviewed McDonough, that Sr. Inv. O'Brien was conducting an independent investigation into the AB forgery and arrested McInerney without his prior knowledge, Trey Smith and Ogden orchestrated a false personnel complaint and/or departmental charges to be made against Sr. Inv. O'Brien concerning an unrelated matter.

1068. Upon information and belief, that false complaint and/or charges was made by Trey Smith with the assistance of Ogden to quash the independent NYSP investigation, impugn the

credibility of Sr. Inv. O'Brien when subpoenaed by McDonough to testify about the matters at trial and to force him to answer questions about a pending FBI investigation.

1069. Subsequently, on the date or dates known to Trey Smith, Ogden and the NYSP, Sr. O'Brien was ordered by his superiors to submit to a compelled interrogation by Trey Smith about the purported leaking of information concerning Trey Smith's investigation.

1070. Upon information and belief, however, when Trey Smith questioned Sr. Inv. O'Brien, he asked questions solely about his knowledge of the FBI investigation and, specifically, whether the FBI had *"bugged his office"* or *"tapped his phone"* during its investigation of McDonough's complaint of public corruption, so it was stopped by the NYSP.

1071. Upon information and belief, during the interrogation, Trey Smith was nervous and perspired so profusely that sweat dripped down his face and wet his clothes.

XXXVI. Extraordinarily Favorable Plea Agreements and Defective Convictions.

1072. Subsequently, Campana and Galuski were indicted for a few felonies each.

1073. Thus, McDonough forced the arrest and/or ostensible prosecutions of McInerney, Brown, Remia, Campana and Galuski almost two years after the AB forgery they committed in conspiracy but only because of the integrity and commendable actions of Sr. Inv. O'Brien and an FBI agent, both of whom Trey Smith labeled as being criminals.

1074. However, Trey Smith gave immunity agreements to one of the three primary perpetrators and extraordinarily favorable cooperation agreements and plea bargains to the other two whom he initially told would not prosecute after misleading and lying to the NYSP.

1075. Trey Smith also blindly accepted the denial of guilt from about seven other people the evidence directly implicated in criminal responsibility.

1076. Thereafter, Trey Smith gave extraordinarily favorable plea bargains, sentences and other dispositions to those Dem C/O at least ostensible prosecuted.

A. *Trey Smith Arranged a Jurisdictionally Defective Conviction for McInerney.*

1077. Upon information and belief, as stated, despite the fact that McInerney committed hundreds of readily provable AB forgery crimes in 2009, 2008 and 2007, Trey Smith agreed to accept one felony conviction and a sentence of a minimum number of hours work order.

1078. Upon information and belief, Trey Smith also arranged for McInerney to plead guilty before any cooperation was given, as stated.

1079. However, Trey Smith cancelled that plea deal after the supervisory NYSP indicated that they would then arrest McInerney for AB forgery he committed in 2007 and 2008 because they were not satisfied with the manner in which the matter was being handled.

1080. Upon information and belief, Trey Smith then had himself appointed for the prosecution of those crimes and arranged a jurisdictionally defective conviction for McInerney by filing a Superior Court Information ("SCI") alleging a crime not charged by felony complaint.

1081. When McDonough exposed the defect to the trial court, Trey Smith initially denied the same but then tacitly admitted it after McInerney's attorney did so.

1082. Specifically, on August 26, 2011, McInerney waived indictment and consented to be prosecuted by SCI for a 2009 AB forgery.

1083. However, the SCI was apparently not filed with the Court at the time of the waiver of indictment as strictly and jurisdictionally required by State Constitution and statutes. See, NYS Constitution Art 1, § 6; CPL 195.40 CPL 195.20, 200.15, 1.20(3-a); *People v. Boston,* 75 NY2d 585 (1990); and McKinney's, CPL 195, Practice Commentaries, Peter Preiser, p.190.

1084. Consequently, under State statutory and case law, McInerney's conviction is effectively a nullity that must be vacated upon motion whenever made.

1085. More importantly, the subject waiver and SCI charged a 2009 forgery for which a felony complaint was never filed and upon which McInerney was not held for Grand Jury action.

1086. Again, therefore, McInerney's conviction is a nullity and subject to being vacated upon motion whenever made. See, N.Y.S. CPL §§ 180.30, 190.55, 195,40 and CPL 200.15.

1087. Nonetheless, Trey Smith never cured that defect even though it provides a basis for McInerney to vacate the conviction upon motion without limitation.

B. *Trey Smith Arranged a Jurisdictionally Defective Conviction for Brown.*

1088. Upon information and belief, Trey Smith also arranged a jurisdictionally defective conviction for Brown by filing a felony complaint alleging a crime which was the subject of a pending Grand Jury proceeding.

1089. Upon information and belief, Brown testified before the Grand Jury that was considering evidence of his AB forgery obtained through the independent NYSP investigation.

1090. Upon information and belief, without an indictment being returned, Trey Smith then filed a SCI and accepted Brown's guilty plea to the charge alleged therein.

1091. Consequently, under State statutory and case law, Brown's conviction is effectively a nullity that must be vacated upon motion whenever made.

1092. Nonetheless, Trey Smith never cured that defect even though it provides a basis for Brown to vacate the conviction upon motion without limitation.

1093. Upon information and belief, the immunity and extraordinarily favorable cooperation agreements, pleas bargains and other dispositions that Trey Smith provided for all the Dem C/0 and others implicated in the AB forgery is evidence of the

conspiratorial scapegoat prosecution and its objectives.

XXXVII. Fabricated False Trial Testimony to Continue Scapegoat Prosecution.

1094. Next, Trey Smith presented the fabricated false testimony of McGrath, Brown, O'Malley, McInerney, Renna, Robillard, Ogden and Dan Brown at trial to continue the scapegoat prosecution of McDonough in furtherance of their extra-judicial conspiracy.

1095. All of the witnesses were interviewed by Trey Smith in his investigatory capacity and their false testimony was fabricated and presented to initiate, continue and cover-up a conspiracy entered into on or about October and/or November 2009 and at all times thereafter, long before any related judicial proceedings were commenced.

1096. The actions, including the silencing and tampering with witnesses and other orchestrations, as well as any later false testimony as needed, were all overt acts that were done and anticipated to be done as the conspiracy evolved, depending initially only on McDonough's actions but later also those of the supervisory NYSP and FBI.

1097. The most plausible inference to be drawn from the record facts is that that once the conspiracy was hatched, those involved were "coached" by Trey Smith as to what false testimony was needed to incriminate McDonough and/or not incriminate their cohorts, exonerate McDonough or expose the conspiracy; i.e. he fabricated the testimony needed, as needed.

A. *DeFiglio's New Fabricated False Testimony was Precluded By Court.*

1098. At trial, to support the prosecution theory, Trey Smith also attempted to offer the additional fabricated false testimony of DeFiglio that McDonough taught him how to trace forge voter signatures from voter registration cards.

1099. In chambers, Trey Smith proffered DeFiglio's new testimony that McDonough had showed him how to place registration cards against his computer to trace voter signature's onto forged AB documents, but then, when McDonough disclosed that he had no computer when the incident was alleged to have happened, Trey Smith proffered DeFiglio's changed testimony that McDonough showed him at that time how to trace the signatures by placing the cards against his office window, until McDonough disclosed that he was not the BOE Commissioner and had no office or workplace window at the time.

1100. The Court then denied Trey Smith's proffer to introduce the new false testimony.

1101. Otherwise, DeFiglio testified as truthfully about facts that exposed the conspiratorial prosecution as he did falsely about facts fabricated to further it.

1102. Upon information and belief, DeFiglio's false testimony was fabricated in material part and given to support of the prosecution theory, be consistent with the false testimony of McGrath, Ogden and O'Malley and falsely convict McDonough, as discussed.

B. *McInerney's Fabricated False Trial Testimony.*

1103. McInerney testified falsely consistent with his prior fabricated statement in the incrimination of McDonough and support of the prosecution theory, as stated above.

1104. Upon information and belief, McInerney's false testimony was fabricated in material part and given to support of the prosecution theory, be consistent with the false testimony of McGrath, Ogden and O'Malley and falsely convict McDonough, as discussed.

C. *O'Malley's Fabricated False Testimony.*

1105. O'Malley gave false trial testimony to continue the conspiratorial scapegoat prosecution of McDonough that was consistent with his false Grand Jury testimony.

1106. O'Malley also gave new false testimony in addition to that he gave before the Grand Jury in the incrimination of McDonough and support of the prosecution theory.

1107. At trial, O'Malley added that on September 14, 2009, he heard McDonough tell McInerney the number of AB votes needed to win the WFP primary and that he had two HVCC students who owed him a favor whose could be counted on to vote by AB.

1108. O'Malley's testimony was fabricated to be consistent with the false testimony of McInerney concerning the forged AB documents of Joseph and Paterson, the two HVCC students from whom the

Dem C/O did not solicit an AAB on September 12, 2009.

1109. In fact, only McInerney knew that he helped those two HVCC students establish residency for reduced tuition and paid them to enroll in the WFP. Neither McDonough nor O'Malley had any contact with either of them.

1110. Therefore, it is clear that Trey Smith fabricated O'Malley's additional false accusation with McInerney's participation: their false trial testimony could not have been consistent unless McInerney told Smith about the HVCC students and O'Malley agreed to lie.

1111. Upon information and belief, O'Malley's false testimony was wholly fabricated and given to support of the prosecution theory, be consistent with the false testimony of McGrath, Ogden and O'Malley and falsely convict McDonough, as discussed.

D. *McGrath's Fabricated False Testimony.*

1112. McGrath gave false trial testimony to continue the conspiratorial scapegoat prosecution of McDonough that was consistent with his false written statement and Grand Jury testimony, as discussed.

1113. Essentially, McGrath testified that he committed no crime, any voter who incriminated him was wrong, any AB document that contradicted his false testimony was wrong and only McDonough committed any crime, as discussed.

1114. Upon information and belief, McGrath's false testimony was wholly fabricated and given to support of the prosecution theory, be consistent with

the false testimony of McGrath, Ogden and O'Malley and falsely convict McDonough, as discussed.

E. *Brown's Fabricated False Testimony.*

1115. Brown gave false trial testimony to continue the conspiratorial scapegoat prosecution of McDonough that was consistent with his false written statement, as discussed.

1116. Despite having to admit that he forged AB documents, his brother was his campaign manager, he knew completed AAB had to filed to obtain AB and he and/or his brother took all the AAB in question to McInerney to be copied and used to forge signatures on AB envelopes, Brown still failed to exonerate McDonough or admit the entire truth.

1117. Brown denied that he committed the crimes in conspiracy with other Dem C/O, and then admitted it, but only to recant that admission the next day.

1118. Brown did not tell the truth about what happened on September 14, 2009 in McDonough's office concerning the entry of AB Agent names or Excuses on those AAB that would have incriminated McGrath and O'Malley in perjury and exonerated McDonough.

1119. Upon information and belief, Brown's testimony was false in all material respects and fabricated in conspiracy with Trey Smith and/or others to continue the scapegoat prosecution of McDonough and obtain the objectives of their extrajudicial conspiracy, as alleged.

1120. Upon information and belief, Brown's false testimony was fabricated in material part and

given to support of the prosecution theory, be consistent with the false testimony of McGrath, Ogden and O'Malley and falsely convict McDonough, as discussed.

F. *Renna's Past and New Fabricated False Testimony Stricken by Court at Retrial.*

1121. Renna gave false trial testimony to continue the conspiratorial scapegoat prosecution of McDonough that was consistent with his false written statement, as discussed.

1122. At the first trial, Renna also gave the additional fabricated false testimony that McDonough licked the AB envelope of either Testa or Robertson or both.

1123. Renna also falsely testified that McDonough gave him voter registration cards to trace forge the signatures of those voters onto their AB documents, even though the BOE was computerized and had none.

G. *Dan Brown's Fabricated False Testimony.*

1124. Upon information and belief, Renna's false testimony was wholly fabricated and given to support of the prosecution theory, be consistent with the false testimony of McGrath, Ogden and O'Malley and falsely convict McDonough, as discussed.

1125. In any event, when subjected to more exacting cross-examination at the second trial, Renna's testimony was so patently false and fabricated to support the prosecution theory and fabricated false testimony of McGrath, O'Malley, Brown and Robillard that it was stricken in its

entirety and he was directed to leave the courthouse immediately.

1126. Nonetheless, Trey Smith did not prosecute Renna for perjury or rescind his cooperation agreement because of his patently false testimony.

1127. Dan Brown testified that he essentially committed no crimes and did not know anything about any crimes committed by anyone.

1128. However, Dan Brown was his brother's campaign manager, obtained signed AAB from voters on September 12, 2009 that were falsely completed and he was in possession of the AAB that McInerney copied to forge signatures on AB envelopes.

1129. Dan Brown's trial and Grand Jury testimony puts him in possession of AAB and/or AB he gave to McInerney and/ or obtained from him and filed before and/or after they were forged and his contradictory and inconsistent testimony shows that he was involved in the commission of the AB forgery in conspiracy with him and other guilty Dem C/O, especially his brother's admission albeit recanted.

1130. In regard to the thirteen AAB filed on September 12, 2009, McInerney admitted that he had all those AAB in his possession and that one of his co-conspirators filed them with the BOE, but he could not recall which one.

1131. Upon information and belief, the Grand Jury and trial testimony of Dan Brown and others makes it more plausible than not that Dan Brown at least possessed and filed them.

1132. In particular, Dan Brown testified that he obtained AB from McInerney and mailed them to the BOE without knowledge that they were forged.

1133. However, Dan Brown testified in the Grand Jury that he filed certain AAB which McDonough was indicted for forging, before Trey Smith changed his question to make sure he meant AB not AAB as he first said. That relevant testimony is incorporated herein by reference.

1134. Upon information and belief, Dan Brown testified materially falsely and failed to tell the truth about the AB forgery that would have exonerated McDonough.

H. *Ogden's Fabricated False Testimony.*

1135. At trial, Ogden had to admit that his Grand Jury testimony that all the AB Agent names and Excuses on all the AAB were written in the same handwriting and in a pattern that showed they were all written by the same person was wrong.

1136. Ogden admitted that Trey Smith directed and participated in the investigation.

1137. Ogden also admitted that he talked to Robillard about the theory of prosecution and evidence before he rendered his purported objective FDE report.

1138. Most interestingly, Ogden testified that he and Trey Smith believed the self-serving sworn statements of McGrath over those of the voters where their testimony was contradictory concerning whether they wrote or gave him permission to write on their AAB or voted or gave him permission to vote their AB.

1139. Otherwise, Ogden falsely testified consistently with his fabricated false Grand Jury testimony to continue the scapegoat prosecution of McDonough.

I. *Robillard's Fabricated False Testimony.*

1140. At trial, Robillard falsely testified consistent with his report, as stated.

1141. In substance, Robillard gave the fabricated false testimony that his FDE findings indicated that McDonough wrote all the false AB Agent names and Excuses on all the falsified AAB in support of the prosecution theory and the fabricated false Grand Jury and trial testimony of McGrath, O'Malley, Brown and Ogden.

1142. Upon information and belief, Robillard's testimony regarding his purported findings and opinions was no more than fabricated false, improper and subjective testimony given contrary to accepted standards of FDE practice that he was required to follow in order to render objective findings and opinions in a Court.

1143. Upon information and belief, Renna's false testimony was wholly fabricated and given to support the prosecution theory, be consistent with the false testimony of McGrath, Ogden and O'Malley and falsely convict McDonough, as discussed.

1144. Upon information and belief, Robillard's fabricated false testimony was also given to provide Ogden a basis to assert that his Grand Jury testimony was ostensibly reasonable.

1145. Robillard admitted that he came to his findings and rendered his related opinion testimony

without comparing the handwriting of Brown, Dan Brown, McGrath or other suspects.

1146. Later, after the NYSP arrested McInerney and Brown, Robillard obtained and compared handwriting samplers from Brown and Dan Brown.

1147. At that time, Robillard had to admit that the handwriting of Brown, Dan Brown and McDonough was very similar.

1148. Robillard also gave well-rehearsed, improper and false subjective opinion testimony about indentation "evidence" he found from analysis of the falsified AAB.

1149. Robillard also gave testimony about ink analysis performed on AAB.

1150. Robillard also falsely, improperly, callously and maliciously testified numerous times that his handwriting opinions were "overwhelming evidence" that McDonough wrote the false AB Agent names and Excuses on all the AAB, despite the fact that established standards of practice permit only "expressions in degree of confidence" in the "grey area" of opinion and he did not make a single "identification" for any document.

1151. Robillard also testified that his indentation and ink findings were evidence that McDonough wrote the AB Agent names and Excuses on all those AAB.

1152. However, Robillard admitted that Trey Smith directed him to not perform an ink analysis on fourteen (14) specifically identified AAB, including the Dickenson AAB.

1153. Again, McGrath testified before the Grand Jury that he witnessed McDonough write a false Excuse on the Dickenson AAB and heard McDonough talking about names he could write as false AB Agents on all the AAB the Dem C/O obtained in concert.

1154. Based on McGrath's testimony, Trey Smith adopted the prosecution theory that all questioned AAB were forged "behind the counter" by McDonough at his "forgery factory."

1155. Ogden then falsely testified before the Grand Jury, in support of the prosecution theory, that the false AB Agent and Excuses on all the AAB appeared were written in the same handwriting as the Dickenson AAB and showed a pattern that indicated that they were all written by the same person.

1156. However, upon information and belief, the Dickenson and each of the other thirteen (13) AAB that Trey Smith directed Robillard not to perform an ink analysis upon appear to the naked eye to have been written entirely in the same ink.

1157. In view of the record facts, the finding that fourteen (14) AAB were completed in the same ink alone would have exonerated McDonough, disproved the false testimony against him, debunked the prosecution theory and exposed the wrongful prosecution, but it was effectively suppressed by Trey Smith and Robillard.

1158. Therefore, it is obvious that Trey Smith and Robillard did not perform an ink analysis on those fourteen (14) AAB because the findings would have confirmed what was apparent to the naked eye

before McDonough was indicted for entering false data on them: they were completed entirely in the same ink before being filed at the BOE by the Dem C/O.

1159. That forensic evidence also would have: proven that McGrath, McInerney, Brown and others committed the crimes in conspiracy, breached Cooperation Agreements and committed perjury; debunked the purported prosecution theory; and exonerated McDonough.

1160. Upon information and belief, McInerney's false testimony was fabricated in material part and given to support the prosecution theory, be consistent with the false testimony of McGrath, Ogden and O'Malley and falsely convict McDonough, as discussed.

XXXVIII. Trey Smith Sought More Favorable Sentence for Brown, Spoke on Behalf of Renna at Sentencing, Aided Brown in Frivolous Appeal and Dismissed Indictments against Campana and Galuski.

A. *Trey Smith Asked Court to Sentence Brown to Probation.*

1161. At sentencing, Trey Smith asked the court to impose a sentence of probation even though Brown committed perjury before the Court and Grand Jury and Trey Smith and Brown at trial repeatedly told the jury that Brown might be sentenced to prison in order to bolster his credibility and rebut evidence of the scapegoat prosecution.

B. *Trey Smith Spoke in Support of Renna at Sentencing.*

1162. At sentencing, Trey Smith asked the court to sentence Renna to work order in accordance with his cooperation agreement even though he committed such blatant perjury in breach of it that his entire trial testimony was stricken from the record

C. *Trey Smith Dismissed Indictments against Campana and Galuski.*

1163. Upon information and belief, consistent with the conspiratorial scapegoat prosecution and its cover-up, Trey Smith also ostensibly prosecuted Galuski or Campana only to dismiss the pending indictments against them soon after McDonough's trial acquittal.

D. *Trey Smith Did Not Oppose Brown's Frivolous Appeal or Misrepresentations.*

1164. According to a record plea agreement, Brown waived the right to appeal and agreed to be sentenced within the sole discretion of the Court, but upon Trey Smith's recommendation of no more than six months incarceration and five years probation.

1165. At trial, Brown testified he was the only defendant who was going to go to jail or prison and Trey Smith repeatedly made the same representation to bolster his credibility.

1166. However, when the court imposed that sentence, Brown filed a frivolous appeal to have his sentence reduced based purely on misrepresentations of fact and law. Brown's brief on appeal is incorporated herein by reference.

1167. In response, Trey Smith effectively joined in Brown's fraudulent appeal until his conduct

was exposed by McDonough. Smith's respondent's brief and McDonough's amicus brief are incorporated herein by reference.

XXXIX. Additional General Allegations

1168. It is alleged that Trey Smith and Ogden in their investigative capacity intentionally suppressed evidence incriminating those who committed AB forgery, suppressed exculpatory evidence through intimidation, coercion, and other tactics and maliciously prosecuted McDonough without probable cause to deprive him of his constitutional rights.

1169. It is alleged that in his investigatory capacity he made promises and threats to those responsible for the AB forgery he did not prosecute to induce them to agree and conspire to fabricate and give false testimony against McDonough in Grand Jury and trial.

1170. It is also alleged that the defendants conspired to do so and committed overt acts in furtherance of that conspiracy.

XL. Defendants Conspiratorially

1171. It is further alleged, that in doing the acts and things stated above, the defendants were conspirators and, at all times relevant, engaged in a scheme and conspiracy designed and intended to deny and deprive the plaintiff of his rights guaranteed to him under the Constitution and the laws of the Unites States, as alleged herein.

1172. It is alleged that Trey Smith in an investigative capacity entered into an extrajudicial conspiracy with the other defendants to fabricate

false testimony to use it in the Grand Jury and at trial to initiate and continue the wrongfully prosecution of McDonough without probable cause to coerce him into pleading guilty or convict him and deprive him of his liberty and rights to due process and a fair trial

1173. Upon information and belief, Trey Smith, McNally, McGrath, O'Malley, Brown, McInerney, Dan Brown and Renna entered into an extrajudicial conspiracy prior to September 24, 2009 and/or thereafter to scapegoat prosecute McDonough and cover-up their unlawful acts which continued all times thereafter, up to and including, December 21, 2012.

1174. Prior to March 2010 and at various times thereafter, Trey Smith acting in concert and conspiracy with the named individual defendants, acting in an investigative capacity, orchestrated the fabrication of their testimony as needed to initiate and continue the scapegoat prosecution of McDonough, as alleged.

1175. Upon information and belief, on or about a specific date unknown to McDonough after the AB forgery was discovered and prior to September 14, 2009 and/or at various times thereafter, Trey Smith, McGrath, Brown, McInerney, O'Malley, Dan Brown, Renna and Ogden entered into an extra-judicial conspiracy to fabricate false testimony to initiate and continue the malicious and false prosecution of McDonough and convict him for alleged acts they knew he did not commit to protect themselves and others from being prosecuted for the

AB forgery they committed in the subject 2009 WFP primary and/or past elections.

1176. Upon information and belief, on or about a specific date unknown to McDonough, Ogden entered into that extrajudicial conspiracy and committed overt acts in furtherance thereof at all times thereafter, up to and including, December 21, 2012.

1177. Upon information and belief, on or about a specific date unknown to McDonough Robillard entered into that extrajudicial conspiracy and committed overt acts in furtherance thereof at all times thereafter, up to and including, December 21, 2012.

1178. Upon information and belief, McGrath, O'Malley, Brown, McInerney, Dan Brown, Renna, Ogden and Robillard intentionally and maliciously gave that false testimony acting in conspiracy with Trey Smith and/or others to initiate, continue and cover-up the unlawful, scapegoat prosecution of McDonough.

1179. The false testimony and other alleged acts of the defendants to initiate, continue and cover-up the scapegoat prosecution of McDonough, from on or about October 2009 until December 21, 2013 were overt acts in furtherance of that conspiracy.

1180. On or about September 24 to September 28, 2009, and thereafter until December 21, 2012, McNally and the County allowed Trey Smith to continue the wrongful prosecution of McDonough by opposing his disqualification or failing to commence an action to have his illegal appointment nullified in

accordance with the established law of which he was given notice.

1181. The failure of McNally and County officials to take action to disqualify Trey Smith despite notice and knowledge of its unlawfulness caused McDonough to suffer a wrongful prosecution that resulted in two protracted trials, great monetary expense and substantial personal injury.

XLI. County Policymaking Decisions and Actions

1182. At all times relevant, Trey Smith acted as an agent, employee and/or officer of the County and in his purported capacity as Special District Attorney for the County. In addition, he acted as a policy maker in his actions investigative, administrative and extra-judicial actions as Special District Attorney.

1183. At all times relevant, McNally acted as an agent, employee and/or officer of the County and in his capacity as District Attorney and while acting within the course of his employment and in his official capacity. In addition, he acted as a policy maker in his administrative and extra-judicial actions as District Attorney.

1184. At all times relevant, despite having knowledge of the *ultra vires* actions of McNally and Trey Smith to fabricate and use false testimony to initiate and continue his unlawful malicious prosecution without probable cause and deprive him of his liberty and property rights as alleged, the county and its officials took no action to prevent or stop their conduct, but instead have condoned,

supported and ratified the continued violation of his rights as alleged herein.

1185. At all times relevant, the defendant policy-making officials McNally and Trey Smith affirmatively acted to fabricate and use false testimony to initiate and continue his unlawful malicious prosecution without probable cause and deprive him of his liberty, property and other rights, as alleged.

1186. Therefore, at all times relevant, by their conspiratorial conduct and failure to take action to prevent the continued unlawful prosecution of the plaintiff in violation of his rights and well established law, the defendant policymaking and supervisory city officials have established a municipal policy of unlawfully initiating and continuing the unlawful malicious prosecution of McDonough in violation of his well established constitutional rights, as alleged.

1187. All of the alleged acts of Trey Smith, although *ultra vires* and beyond the scope of law, were done under the color of his purported appointed office and constitute unlawful and unjustifiable policy acts and decisions of the respondent County.

1188. The act of McNally unlawfully disqualifying himself and his staff from the patently broad-scoped investigation and prosecution of the subject matter and have Trey Smith appointed Special District Attorney was a policy act and decision of the defendant County that was made to allow and/or did allow Trey Smith to, among other *ultra vires* acts, commence and continue a wrongful

prosecution against McDonough based on fabricated testimony.

1189. The acts of McNally and all of the acts of Trey Smith thereafter were *ultra vires* and beyond the scope of the law but within the scope of their employment.

1190. On or about September 24 to September 28, 2009, and at all times thereafter up until December 21, 2112, McNally and the County failed to take proper and necessary action to prevent Trey Smith from taking any further unlawful action pursuant to his illegal appointment by bringing a civil actions to have his appointment declared null and void in accordance with the mandates of well-established law of which they were aware and provided timely notice.

1191. The failure and willful refusal of McNally and the County to take proper and timely action to prevent the acts of Trey Smith from initiating and/or continuing a prosecution of McDonough based on fabricated false testimony constituted an unlawful policy decision that caused McDonough to suffer a wrongful prosecution which resulted in two protracted trials, all at great monetary expense and substantial personal, mental and emotion injury.

1192. McNally effectively initiated the wrongful prosecution of McDonough by unlawfully disqualifying his office from the matter and obtaining an *ultra vires* Court order appointing Trey Smith as Special District Attorney and thereafter continued it by opposing and failing to take action to have him disqualified and the indictment dismissed

despite notice and knowledge of its unlawfulness and that Trey Smith was acting illegally and in excess of the law.

1193. McNally's actions in effectively suppressing the disclosure of evidence material to McDonough's defense was a wrongful and unjustifiable policy act and decision made to, and/or did, further the wrongful and malicious prosecution of McDonough, as stated.

1194. Trey Smith's actions in initiating and continuing the unlawful prosecution of McDonough with notice and knowledge of its unlawfulness and that he acting outside the scope of the law constituted an unlawful policy decision that caused McDonough to suffer a wrongful prosecution which resulted in two protracted trials, all at great monetary expense and substantial personal, mental and emotion injury.

1195. In addition, the County Legislature and County Executive had notice and knowledge of the alleged *ultra vires* and unlawful acts of McNally and Trey Smith. Therefore, its acts in failing to take timely and appropriate action to have Trey Smith's Court Order of appointment declared null and void, despite having notice and knowledge that Trey Smith was acting illegally and in excess of the law, constituted a policy or policymaking decision or policy act that was adopted and ratified by the County through its legislative and/or executive body.

XLII. Violations and Claims Alleged

1196. Plaintiff has been subjected, by the above recited acts, to the deprivation by the defendant, under color of law and of the customs of

the State of New York, of the rights, privileges and immunities secured to him by the Constitution and the laws of the Unites States as stated herein.

1197. As a direct and proximate result of the defendants' concerted actions, under color of law, McDonough has suffered the deprivation of his civil and constitutional rights; serious physical, mental and emotional injuries, pain and suffering, including physical illness, extreme mental and emotional distress, depression and anxiety, loss of self-esteem, and feelings of helplessness and worthlessness; humiliation, embarrassment, ridicule, indignity and social and personal stigmatization; invasion of privacy; actual and *presumed damages* to his good professional name and reputation in the social community; medical expenses, investigation costs, substantial attorney fees and other monetary damages in defending against the defendants' malicious relentless unconstitutional conduct and in pursuing the claims herein.

XLIII. Plaintiff's Injuries

1198. As a direct consequence and result of the acts of the defendants alleged herein, plaintiff was deprived of his liberty, caused great expense and restrained in his travel and been irreparably injured and damaged.

1199. On January 28, 2011, McDonough was arrested by the New York State Police, processed on the sealed indictment before arraignment, taken into the custody, and arraigned before the Rensselaer County Supreme Court. At that time, the Court ordered that he remain within the jurisdiction of the Court and surrender any passport.

1200. McDonough then suffered two trials upon said charges before the Rensselaer Court Supreme Court in the City of Troy, upon which he was acquitted on December 21, 2012.

1201. Upon information and belief, no reasonable view of the facts and circumstances could have supported the criminal charges against McDonough or his prosecution based thereon.

1202. McDonough was innocent of the charges on which he was wrongfully indicted and unlawfully, maliciously prosecuted.

1203. Plaintiff suffered greatly from January 27, 2010, and at all times thereafter, including sixteen (16) weeks of two protracted trials that ended on December 21, 2012 with his exoneration on all (74) felony charges.

1204. McDonough also suffered emotional distress due to being subjected to the criminal process and the deprivation of his rights as stated herein and his injuries were caused solely by the intentional, wrongful and illegal actions of Rensselaer County policymaking officials Trey Smith and McNally, who while acting in the course and scope of their duties, and in conceit and conspiracy with the other respondents, without proper investigation and determination of the facts, caused McDonough to be wrongfully and falsely accused, indicted, arrested and maliciously prosecuted.

1205. Due to the conduct of the defendants, McDonough has and likely will suffer public disgrace, ridicule, contempt and reproach; castigation from law enforcement officials; injury to his character and good reputation; great mental

anguish and pain, and irreparable injury in his profession, all to his monetary damage.

1206. Plaintiff also sustained exorbitant criminal defense attorney fees and costs.

1207. The monetary damages and injuries suffered by claimant were caused solely and directly by the malicious actions of Trey Smith while acting in the course of his employment as Special District Attorney of Rensselaer County to obtain the objectives of an extrajudicial conspiracy with the other named individual defendants to scapegoat prosecute the plaintiff for acts he did not do that do not constitute the forgery crimes charged as a matter of law.

1208. Plaintiff has also suffered the loss of income as a result of his wife effectively being compelled to resign to avoid wrongfully termination from employment due to the adverse publicity of the matter and the same has also caused his substantial economic hardship. He has also suffered continued emotional distress and public humiliation.

COUNT I

SIXTH AMENDMENT RIGHT TO A FAIR TRIAL

FIFTH AMENDMENT DUE PROCESS

FOURTEENTH AMENDMENT DUE PROCESS

Constitutional Right Not to be Deprived of Liberty as a Result of Fabrication of Evidence

(CIVIL RIGHTS CLAIM UNDER 42 U.S.C. SECTION 1983)

Zahrey v. Coffey, 221 F3d 342, 344 (2d Circ., 2000); Ricciutti v. NYC Transit Authority, 124 F. 3d 123 (2d Circ., 1997).

1209. Plaintiff incorporates by reference and re-alleges all of the allegations contained in paragraphs 1 through 1120 as if set forth fully herein.

1210. In committing the acts complained of herein, the defendants acted, individually and/or conspiratorially, under color of state law to deprive the plaintiff of certain constitutionally protected rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, including, but not limited to: (a) the right to be free from unreasonable searches and seizures; (b) the right not to be deprived of liberty without due process of law; (c) the right not to due process of law, both procedural and substantive; (d) the right to be free from malicious arrest and/or prosecution without probable cause; and (e) the right to a fair trial.

1211. Specifically, the plaintiff has Constitutional right not to be deprived of his liberty, liberty interests or a fair trial as a result of the fabrication of false evidence by a government officer acting in an investigatory capacity especially where that officer foresees that he himself will use the evidence with a resulting deprivation of liberty.

1212. The defendants deprived plaintiff of those rights in violation of the Fifth, Sixth and/or Fourteenth Amendments to the United States Constitution and Title 42 USCS § 1983, as alleged herein.

1213. This claim arises directly under both Title 42 USCS § 1983 and under the United States Constitution.

COUNT II

FOURTH AMENDMENT

FOURTEENTH AMENDMENT DUE PROCESS CLAIM

Constitutional Right Not to be Prosecuted Maliciously without Probable Cause

(CIVIL RIGHTS CLAIM UNDER 42 U.S.C. SECTION 1983)

Singer v. Fulton County Sheriff, 63 F3d. 110 (2d Circ., 1995)

1214. Plaintiff incorporates by reference and re-alleges all of the allegations contained in paragraphs 1 through 1120 as if set forth fully herein.

1215. In committing the acts complained of herein, the defendants acted, individually and/or conspiratorially, under color of state law to deprive the plaintiff of certain constitutionally protected rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, including, but not limited to: (a) the right to be free from unreasonable searches and seizures; (b) the right not to be deprived of liberty without due process of law; (c) the right not to due process of law, both procedural and substantive; and (d) the right to be free from malicious arrest and/ or prosecution without probable cause.

1216. Specifically, the plaintiff has Constitutional right not to be arrested, detained,

restricted in liberty and/or prosecuted without probable cause, including when deprived of his liberty, liberty interests or a fair trial as a result of the fabrication of false evidence by a government officer acting in an investigatory capacity especially where that officer foresees that he himself will use the evidence with a resulting deprivation of liberty.

1217. The defendants deprived plaintiff of those rights in violation of the Fifth, Sixth and/or Fourteenth Amendments to the United States Constitution and Title 42 USCS § 1983, as alleged herein.

1218. This claim arises directly under both Title 42 USCS § 1983 and under the United States Constitution.

COUNT III

Monell Claim Against County

(CIVIL RIGHTS CLAIM UNDER 42 U.S.C. SECTION 1983)

1219. Plaintiff incorporates by reference and re-alleges all of the allegations contained in all of the paragraphs above as if set forth fully herein.

1220. Defendant County violated the plaintiff's rights and caused him said deprivations through its policymaking acts decisions, as alleged herein.

DEMAND FOR PUNITIVE DAMAGES

Upon information and belief, at all times relevant, the individual defendants acted with malice, intent to injure, or deliberate, reckless or callous indifference to McDonough's well established rights under the Fourth, Sixth and Fourteenth

Amendments of the United States Constitution which provides a basis for the imposition of punitive damages.

The actions of the individual defendants as described herein were extreme and outrageous, and shock the conscience of a reasonable person. Consequently, an award of punitive damages is appropriate to punish the defendants for their cruel and uncivilized conduct.

DEMAND FOR TRIAL BY JURY

The plaintiff hereby demands a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays for the following relief:

1. Judgment against the defendants individually, jointly and severally for compensatory damages in the amount of six million ($6,000,000.00) dollars for the actual damages plaintiff has and will suffer; and

2. Judgment against the defendants individually, jointly and severally for punitive damages in the amount of two million ($2,000,000.00) dollars or in such other amount as is commensurate with the wrong and with the defendants' ability to pay; and

3. Order the defendants individually, jointly and severally to make plaintiff whole with respect to pay his full damages proximately resulting from defendants' wrongful actions, including medical and related expenses, travel, copying and postage costs; and

4. Award Reasonable attorney's fees, costs pursuant to 42 USCS § 1988; and

5. Award such other and further relief as the Court deems just and proper; and

If the Court should find for plaintiff, on any or all counts, plaintiff respectfully requests that a separate hearing be held for the production of evidence on the amount of damages.

Dated: December 18, 2015.

s / Brian D. Premo, Esq.

BRIAN D. PREMO, ESQ.
Fed Bar No. 102394
PREMO LAW FIRM PLLC
Attorneys for Plaintiff
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Albany, New York 12211
(518) 436-8000

TREY SMITH, ESQ.
SPECIAL DISTRICT ATTORNEY
Smith Hernandez LLC
Rensselaer Technology Park
105 Jordan Road
Troy, New York 12180-8376
Telephone: (518) 283-4100
Facsimile: (518) 283-7649

April 27, 2011

VIA FACSIMILE (518) 431-0249

William C. Pericak, Esq.
Assistant U.S. Attorney
United States Attorney
Northern District of New York
445 Broadway, Room 218
James T. Foley U.S. Courthouse
Albany, New York 12207-2924

Re: In the Matter of an Investigation Pertaining to Rensselaer County Supreme Court Index No. 230629, Christian Lambertsen v. Lawrence Bugbee, et al.

Dear Bill:

As you must know, I am the Special District Attorney in the above matter, which concerns ballot fraud in the September 15, 2009 primary held in the City of Troy. Yesterday I received a telephone call from Brendan Lyons of the Times Union regarding

an investigation allegedly being conducted by the F.B.I. of the same matter. I assume you were not the source for the story, which appeared in this morning's edition of the Times Union.

You may not know that shortly after my assignment to this case, and after my initial review of the file, I spoke with Acting U.S. Attorney Andrew Baxter and F.B.I. Agent Laura Youngblood regarding the case. I realized then that proper investigation would require substantial resources. Long story short, I was told that given that I was already assigned and that the September 15, 2009 primary was not a federal election, the Government would decline any role, even after I made it clear that I would step aside if the Government would take over the investigation and any prosecution. The New York State Police then agreed to assist, and has expended considerable resources in the investigation, which lead to the indictment of Edward McDonough and Michael LoPorto. The People do not intend the prosecution to end with the indictment of Mr. McDonough and Mr. LoPorto. The State Police and I continue to work the case.

Some may read your refusal "to confirm or deny" that the F.B.I. was investigating the September 15, 2009 primary as discrediting our work. I assume this was not your intent. I called this morning and left messages for you and Rick Hartunian. I would greatly appreciate a return of my calls today so that we can address these issues promptly and avoid any misunderstanding.

Very truly yours,

/s/ Trey Smith
Trey Smith
Special District Attorney

TS/mw
cc.: Capt. Steven James *(via e-mail)*

TREY SMITH, ESQ.
SPECIAL DISTRICT ATTORNEY
Smith Hernandez LLC
Rensselaer Technology Park
105 Jordan Road
Troy, New York 12180-8376
Telephone: (518) 283-4100
Facsimile: (518) 283-7649

April 28, 2011

VIA FACSIMILE (518) 431-7463

Special Agent in Charge Clifford C. Holly
The Federal Bureau of Investigation
200 McCarty Avenue
Albany, New York 12209

Re: In the Matter of an Investigation Pertaining to Rensselaer County Supreme Court Index No. 230629, Christian Lambertsen v. Lawrence Bugbee, et al.

Dear Special Agent in Charge Holly:

I am the Special District Attorney in the above matter, which concerns ballot fraud in the September 15, 2009 primary held in the City of Troy. Two days ago I received a telephone call from Brendan Lyons of the Times Union regarding an investigation allegedly being conducted by the Albany office of the F.B.I. of the same matter.

Shortly after my assignment to this case in late September, 2009, and after my initial review of the file, I spoke with Acting U.S. Attorney Andrew Baxter and F.B.I. Agent Laura Youngblood regarding the case. I realized then that proper investigation would require substantial resources. Long story short, I was told that given that I was already assigned and that the September 15, 2009 primary was not a federal election, the Government would decline any role, even after I made it clear that I would step aside if the Government would take over the investigation and any prosecution. The New York State Police then agreed to assist, and has expended considerable resources in the investigation, which lead to the indictment of Edward McDonough and Michael LoPorto. The People do not intend the prosecution to end with the indictment of Mr. McDonough and Mr. LoPorto. The State Police and I continue to work the case.

Yesterday I called and left a message at your office for someone to return my call. I did not leave the message for you specifically, because I did not know yet what I was dealing with. Later that same day I spoke with Assistant U.S. Attorney William C. Pericak, whom I have known for a number of years. Mr. Pericak's reputation for candor and forthrightness is impeccable. Mr. Pericak told me that the first he had heard of an investigation by the F.B.I. of this matter was two evenings ago, when he received a call for comment from Mr. Lyons. Mr. Pericak also confirmed for me, again, that the Government had no jurisdiction to investigate this matter. I assumed that what had occurred was that Brian Premo, the attorney for Mr. McDonough, had

gotten an interview with an F.B.I. Agent, that this Agent had told Mr. Premo that he would "look into" his claims (which include alleged prosecutorial misconduct and selective prosecution, claims which are categorically denied), and that there was nothing more to this story, and I so advised Capt. Steven James of Troop G, Loudonville.

A few hours after my conversation with Mr. Pericak, I received a telephone call from local investigative television journalist John McLaughlin, who asked me to respond to his information, which he allegedly had confirmed with several defense attorneys, that a local F.B.I. Agent was, in fact, contacting those attorneys to seek permission to speak with witnesses in the case. One of those witnesses allegedly is Robert Martiniano, with whom the State Police and I have been trying to arrange an interview for weeks. The name given to me of the agent scheduling interviews is an Agent McDonald. This morning's Troy Record indicates that the agent also has "sat down" with Mr. Premo.

I trust I do not need to spell out for you the many issues arising from this situation, which has already gone public. These issues are pressing, and need to be resolved immediately. I would greatly appreciate the courtesy of a phone call today.

Very truly yours,

/s/ Trey Smith
Trey Smith
Special District Attorney

TS/mw
cc.: Capt. Steven James *(via e-mail)*
William C. Pericak, Esq. *(via facsimile)*

AFFIDAVIT
CPL 190.30(3)(f)

STATE OF NEW YORK)
COUNTY OF RENSSELAER) ss:

Jolene VanVranken, being duly sworn, deposes and states:

1. My name is Jolene VanVranken.

2. I make this affidavit pursuant to New York Criminal Procedure Law § 190.30(3)(f), which provides that a written statement under oath may be received in a grand jury proceeding as evidence of a person's identity as an ostensible maker, drafter, drawer, endorser or other signator of a written instrument and its falsity within the meaning of New York Penal Law § 170.00.

3. This affidavit is made on personal knowledge, and on information and belief where indicated.

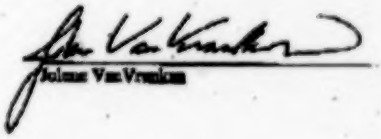
4. On information and belief, as of September 15, 2009, I was enrolled in the Working Families Party and registered to vote in the City of Troy, County of Rensselaer and State of New York. However, the registration was not current. In June, 2010, I moved from the City of Troy to _____ in Rensselaer County, New York.

5. Attached as Exhibits "A" and "B" are copies of an absentee ballot application and absentee ballot envelope which I understand were filed with the Rensselaer County Board of Elections in connection with the September 15, 2009 primary held for voters of the City of Troy. Both documents purport to be an

authentic creation of mine, that is, both purport to have been made or completed by me.

6. The absentee ballot application attached as Exhibit "A" contains entries which I did not make or authorize. I did not sign the application, and I did not authorize anyone to sign the application on my behalf. I was not the source of the information in the "Where will you be on Election Day" section of the application, and the information in that section of the application is false. I did not make the entry in that section of the application, and I did not authorize anyone to make that entry on my behalf. I was not the source of the information in the "Delivery of PRIMARY election ballot" section on the application. I did not make the entry in that section of the application, and I did not authorize anyone to make that entry on my behalf.

7. The absentee ballot envelope attached as Exhibit "B" contains entries which I did not make or authorize. I did not sign the ballot envelope, and I did not authorize anyone to sign the ballot envelope on my behalf. I did not date the ballot envelope, and I did not authorize anyone to date the ballot envelope on my behalf.



Subscribed and sworn to before me
this 8th day of December, 2010.

/s/ Youel C. Smith, III
NOTARY PUBLIC
(seal)

Q. All right. I'm going to show you that. (Affidavit marked Defendant McDonough's Exhibit DD for identification.)

Q. Take a look at the second page of that document, DD, I believe. Is that your signature?

A. No.

Q. And there's no middle initial in that; is there?

A. Eh-eh.

Q. Could you tell us what that document is?

A. I'm sorry?

Q. What does the document say it is?

A. It says it's a deposition.

Q. A forgery deposition for the Grand Jury. Is that what that is? Have you ever seen that document before today, ma'am?

A. I don't remember.

Q. Well, it's not your signature on it; correct?

A. No.

Q. Could you take a look at that signature that's on Page 2 of that document and compare it to the signature on the New York State Police deposition that you gave and signed?

A. Okay.

Q. Which signature appears to be yours?

A. The left one.

Q. And you have been writing that for a long time; right?

A. Yes.

Q. And it's pretty loopy?

A. Yes.

Q. And you signed it with your middle initial?

A. Yes.

Q. And, yet, that forgery affidavit is in completely different handwriting; isn't it?

A. This one?

Q. Yes.

A. Yes.

Q. And who is the Notary on that document?

MR. SMITH: Your Honor --

A. I can't read it.

MR. SMITH: Your Honor, can we approach?

THE COURT: The answer is I can't read it.

MR. PREMO: I would like to offer all of the documents in evidence, Your Honor, for signature purposes, and for further purposes outside the presence of the jury.

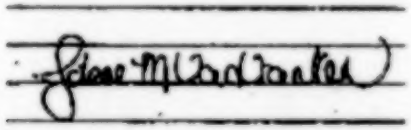
MR. HUG: Your Honor, there's no relevance to this at all.

MR. PREMO: Oh, it has every relevance.

THE COURT: Please, please, please; no editorial comments.

MR. HUG: Your Honor, the testimony was that

* * *



[Defendant's Exhibit __: signature exemplar]

UNCLASSIFIED

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 04/03/2011

To: Albany Attn: Squad 4

From: Albany
Squad 4
Contact: SA

Approved By:

Drafted By:

Case ID #: 194B-AL-49174 (Pending)

Title:

CRIM-LL;
SENSITIVE INVESTIGATIVE MATTER

Synopsis: To report meeting with USAO, NYSP and Special D.A. Trey Smith.

Details: On Thursday, 4/2/2011, from around 1:00 to 4:00, ASAC and SA met with ASAGs New York State Police (NYSP) Investigators and Rensselaer County Special District Attorney Trey Smith to discuss coordination of investigative activity by the FBI and the NYSP.

Smith stated he required an explanation from the FBI and the USAO as to the reasons requested an interview to Smith further it would be impossible for him or the NYSP to work with the FBI or the USAO until he could overcome the "trust issues" he had regarding the FBI. Smith cited one reason he had trust issues was the fact that the local news radio directed to respond to 's request. that, based upon a request from directed to interview

UNCLASSIFIED

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b7C

194B-AL-49174

UNCLASSIFIED

To: Albany From: Albany
Re: 1948-AL-49174, 06/03/2011

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[redacted] stated he explained to [redacted] that the FBI did not normally investigate fraud relating to non-federal elections. [redacted] stated that, based upon [redacted] finding evidence of fraud relating to a Federal election and an apparent ongoing, organized effort to commit voter fraud in [redacted] County, he interviewed other people, including [redacted] whom the NYSP had already interviewed. [redacted] explained he interviewed [redacted] to obtain information about ongoing and historical criminal activity which was beyond the scope of Smith's authority as Special D.A. and which was not included in the statements taken by the NYSP. Smith stated he would take [redacted] at his word but that he still had trust issues to overcome. [redacted] asked Smith to explain his concerns about "trust issues," but Smith did not explain what those trust issues were.

Smith stated [redacted]

[redacted] Smith stated he witnessed [redacted]

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[redacted] Smith stated [redacted]

[redacted] stated he believed [redacted]

[redacted] Smith stated [redacted]

he believed [redacted]

but Smith did not elaborate. Smith stated [redacted] had been interviewed twice by the NYSP and once by himself and Inv. [redacted]

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To: Albany From: Albany
Re: 194B-AL-49174, 06/03/2011

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Smith explained his authority as Special D.A. was narrowly defined under New York County Law section 701, and he did not have authority to investigate matters not directly relating to the September 2009 NYS primary election as described in the lawsuit *Lambertson v. Pagnoo, et al.* Smith had not applied for an expansion of his authority and was not inclined to do so because he was concerned election fraud was so widespread in Rensselaer County that there might be no end to the investigation if he expanded it. Smith was also concerned about the cost the county would incur for such an investigation. As such, Smith believed the only use he could make of evidence or testimony relating to the 2007 or 2008 elections would be Molineux evidence (Federal Rule of Evidence 404b), meaning it might be used as evidence of prior uncharged criminal acts. Smith then said he was considering requesting an expansion of his authority and could not rule it out. Smith did not explain what would cause him to request an expansion.

Smith stated he and the NYSP believed they had enough evidence to warrant prosecution of [redacted] and Inv. [redacted] stated the NYSP investigation would be completed by Friday, 6/10/2011.

Smith said several times that he "welcomed" the involvement of the FBI, and that the FBI's assistance could help the investigation and save Rensselaer County additional expense. Smith added that he "was just one man", that the NYSP had done tremendous work on the investigation, and without the NYSP the defendants in the case likely would have been offered pleas to violation level offenses months ago.

[redacted] advised Smith that the attorneys [redacted] had asked for the opportunity to have their clients full statements to the FBI. [redacted] advised Smith the attorneys for [redacted] said they wanted to give statements to the FBI because they did not trust Smith. [redacted] asked whether anyone had a reason why the FBI should not take statements from them. Sr. Inv. [redacted] stated the NYSP were concerned the DRPO would offer plea deals to witnesses or subjects who gave incriminating statements to the FBI, and that it could negatively affect the NYSP investigation. [redacted]

[redacted]

UNCLASSIFIED

NEW YORK STATE POLICE

VOLUNTARY STATEMENT

COUNTY OF RENSSELAER

STATEMENT START TIME: 8:40 [X] AM [ ] PM

TOWN OF BRUNSWICK

DATED: SEPTEMBER 16, 2011

I, William A. McInerney AGE: 47 AND BORN ON: / /1963, AND RESIDING AT: 2423 21ST ST. APT. #5 TROY, NY, HAVE BEEN ADVISED BY: Inv. John. J. Ogden Jr., OF THE NEW YORK STATE POLICE, OF THE FOLLOWING:

I HAVE THE RIGHT TO REMAIN SILENT AND I DO NOT HAVE TO MAKE ANY STATEMENT IF I DO NOT WANT TO.

IF I GIVE UP THAT RIGHT, ANYTHING I DO SAY CAN AND WILL BE USED AGAINST ME IN A COURT OF LAW.

HAVE THE RIGHT TO HAVE A LAWYER PRESENT BEFORE MAKING ANY STATEMENT OR AT ANY TIME DURING THIS STATEMENT.

IF I SHOULD DECIDE THAT I DO WANT A LAWYER AND CANNOT AFFORD TO HIRE ONE, A LAWYER WILL BE APPOINTED FOR ME FREE OF CHARGE AND I MAY HAVE THAT LAWYER PRESENT BEFORE MAKING ANY STATEMENT.

I ALSO UNDERSTAND THAT I HAVE THE RIGHT TO STOP AT ANY TIME DURING THIS STATEMENT AND REMAIN SILENT AND HAVE A LAWYER PRESENT.

I FULLY UNDERSTAND THESE RIGHTS AND AT THIS TIME, I AGREE TO GIVE UP MY RIGHTS AND MAKE THE FOLLOWING STATEMENT;

/s/ James E. Long	/s/ William McInerney
WITNESS	WILLIAM A. MCINERNEY

I am at the State Police Station in Brunswick, NY. I am here with Gregg Amiroso. Mr. Amiroso is an attorney and associate of my Attorney James Long. Mr. Long has asked Mr. Amiroso to accompany me to this interview, and I acknowledge that he is my legal counsel for the purpose of this interview. I know that Inv.'s Ogden and Fancher have been assigned to investigate the Absentee Voter Ballot Fraud which took place in September of 2009 and affected the Primary election in the City of Troy for the Working Families' Party. I am here to provide any and all information I have pertaining to my conduct and information I possess as to the conduct of other persons who were involved in the procurement and subsequent forgery of Absentee Ballot Applications and the Ballots generated from those ballot applications.

I began my career in politics in the mid nineteen eighties. I received a patronage job in the State Legislature. Edward McDonough Sr. was my Benefactor in receiving this position. My first job was in the Bill Drafting Dept. I moved to the Assembly in various departments. I worked there until 2007. When I received the position I knew my job was contingent upon my service to the Democratic Party.

I had been a volunteer for some time prior to Mr. McDonough helping me to get the job. In 1996 or 1997 I became a committeeman in the City of Troy. In my capacity as a committeeman my responsibilities to the Democratic Party increased. I was now responsible for obtaining signatures on Petitions and for any other tasks required to promote a candidate. I posted Political signs, did mailings, organized fund raisers, and any other function to assist the Party and our candidate's campaigns.

I lost my job in the Legislature in 2007, I needed another job. I thought that if I worked hard and made a significant contribution to the party during the 2007 election cycle I may be able to put myself in a position to ask for a new job in the Democratic Party. I knew from my previous experiences in politics that there were several ways that an election could be influenced. The residents of the City's Low income public housing were also targeted in the party registration process. If a voter was registered in a Political Party, their vote was available to forge in future primary and general elections. I also learned that Absentee Ballots were a way to influence the outcome of an election. By targeting voters who didn't regularly vote, or who had moved away, or were just ignorant to the absentee voting process, an absentee ballot could be cast in their name and it would not be discovered because no one would ask any questions as to the authenticity of the ballot. There were several methods employed to complete this type of manipulation. An actual signature could be procured from the voter with the promise that the vote itself would be taken care of. Another method would be to solicit the absentee

Ballot Application, and if the voter wasn't home, or didn't answer the door, then the name would just be forged. Once I had a list of voters registered in the Democratic Party, I could go out in my district and solicit absentee Ballot Applications in order to generate an actual Absentee Ballot. Once I had the Absentee Ballot I could vote the Party Line on every one and have an influence on the outcome of a given election. When ever I would go to the Beard of Elections to obtain Absentee Ballot applications or to turn in Absentee Ballots I would deal specifically with Ed McDonough Jr., The Democratic Commissioner, or Mary Sweeney his Senior Clerk. I dealt with Ed and Mary for the specific reason that I knew that they would never ask me a question about it. I would ask for many absentee Ballot applications at a time just prior to the election. I wouldn't turn in the absentee Ballots until the day of the election. This is a strategy on both sides of the aisle to prevent the other party from knowing how many absentee ballots are being cast. Whenever I obtained a legitimate ballot, I mailed it in. From my experience, my success rate in procuring Absentee Ballots was far and away above the average of other workers. During the 2007 and 2008 election cycles my success at procuring absentee ballots became common knowledge. Everyone knew that for just about every absentee ballot application that I received, a completed absentee ballot would be received at the board of Elections. I never actually told anyone what I was doing, and no body ever asked me how I was so successful.

In January of 2008 I was rewarded for all of my "hard work." I was appointed to the position of Troy

City Clerk by the Troy City Council. The Democratic Party took control of the City council. Clement Campana was elected as the president of the City Council. Clem nominated me for the position. My efforts at obtaining absentee ballots continued during the 2008 election cycle. I forged absentee ballot applications and I also forged the ballots corresponding to many of those applications. During the 2007 and 2008 election cycles I acted alone in forging ballots and applications. I am convinced that people knew what I was doing, but I did act alone.

In the summer of 2009 several of the City Council candidates expressed concern that the Mayor of Troy, Harry Tutunjian, would cause a large Republican turn out and that some of the lesser known candidates in the Republican party would "ride his coat tails" because he had won by a landslide over the Democratic candidate, Jim Conroy, in the 2007 election. After the first week in July, when Petitions were submitted, there were rumblings within the Democratic Party that we need to control the Working Families Party Line in order for our candidates to keep their seats on the City council. During the third week of August 2009 following a City council committee meeting I was approached by John Brown. John Brown is a City councilman and it is well known that he is very ambitious and wants to be Mayor after Tutunjian's term is over. Brown came up to me following the meeting, outside of the City Hall. I was on my way to my car. Brown told me that he wanted the working Families line. Brown knew that whomever was the City Council President had the inside line at receiving the Party's endorsement to run for Mayor

in the next election, which would be an open seat after Tutunjian's term expired. John Brown, Clement Campana and Michael LoPorto are the Democratic "At large" Candidates on the City council. All three were in agreement that they needed the WFP Line, but all three also wanted to receive the most votes in the "at large" race for City Council. So they were allies and competitors at the same time. All three had Party interests and personal interests working against each other. When I left the City council committee meeting I went to Michael LoPorto's restaurant on 4th St. in Troy. Present at the restaurant were: Michael LoPorto, Clement Campana, Robert Martiniano, Thomas Aldrich, Anthony DeFiglio, Kevin McGrath and me. During the meeting the control of the WFP line was discussed. Michael LoPorto and Clement Campana both spoke to me personally and told me there wishes to control the WFP line. It was clear to me that Brown, Campana and LoPorto all were speaking to me personally because they were aware of my record at procuring absentee Ballots. Kevin McGrath also commented that he would like to control the WFP in his Council District. He stated that he thought there were about thirty WFP votes in his District. Anthony DeFiglio had a list of the registered voters in the WFP. He noted that most of the voters were residents of the City of Troy Public Housing. Anthony advised that procuring those votes wouldn't be a problem. Anthony was a clerk at the City's housing authority, and most of the voters know him and will open their doors for him. I argued against this strategy because knew that I really didn't know most of the officers in the WFP, and I

didn't trust them. I also knew that, even though Harry Tutunjian had won the Mayor's race in 2007, the Democratic candidates had won the City council. I knew that there must have been some previous discussion about winning the WFP line. That was the only explanation for Anthony DeFiglio to have the WFP voter registration list. I didn't want to be involved in the whole idea but I knew that LoPorto, Campana and Brown didn't trust each other and they obviously all were looking to me to insure the outcome. Michael LoPorto said to me; something to the effect of "Lets get the working families Party line, Lets get it done". I knew that I would be taking a chance helping these guys. I was hoping that LoPorto, Campana and Brown would take care of the ballots; but I knew it was going to be a problem. There were several reasons for my concerns. First was that Brown, LoPorto and Campana didn't trust each other. Secondly, I didn't know, or trust, any of the WFP people. And third, there were just too many people involved and I knew something would go wrong, but didn't see myself as having a choice. My job was dependent on those three controlling the WFP line. I was in a no win. If they won and didn't control the line then they would know that I didn't do what was asked and I believed I would probably lose my job, and if they lost, I was out anyway. There was some discussion about the absentee ballot applications and who they would be released to. Michael LoPorto said that Thomas Aldrich would help us. When I obtained a Ballot application I often put "Thomas Aldrich" as the name in the "release to" section of the application.

I made contact with Ed McDonough Jr. I asked him how many votes it would take to insure that our candidates controlled the WFP line. McDonough told me that it would take 125 votes, total in person and absentee, to control the line. During the meeting at LoPorto's, The candidates had a discussion and someone said that we needed 25 votes in each of the six voter districts. I said that there was no possible way that we we're going to get that many votes. It was abundantly clear to me what was expected of me from the three candidates, Brown, Campana and LoPorto. They all knew what my record was for obtaining absentee ballots. I can not stress enough how much they distrusted each other and looked to me to ensure that for every ballot application there was a ballot voted for them.

During the next few weeks I solicited absentee ballot applications in the Public Housing in the City of Troy. I did this with Anthony DeFiglio. Anthony would usually knock on the door and the tenants would answer for him and then I would obtain their signature on the ballot applications. We received approximately thirteen applications between the date of the meeting at LoPorto's and Friday, September 11th, 2009. I can't remember who actually delivered those applications to the Board of Elections. I do remember that I forged those ballots and gave them to Dan Brown along with a couple of others that I had forged for the Democratic Primary. I believe that there may have been sixteen in all. Thirteen from the WFP and three from the Democratic primary. They were all wrapped in a rubber band. I remember when I handed the Ballots to Dan Brown I told him " you should mail these, you

shouldn't hand them all in at once" . I can't say for sure why Dan Brown was the person I gave those ballots to.

On Friday September 11th, 2009 I had telephone conversations with the candidates. We discussed that only about a dozen or so absentee ballots had been completed. It wasn't enough and we all agreed to meet at Griswold Heights on Saturday , September 12th, 2009 to solicit more applications. On Saturday, September 12th, 2009 I met with; John Brown, Dan Brown, Clem Campana, Michael LoPorto, Thomas Aldrich, Gary Galuski, Anthony Defiglio, Kevin McGrath, and Robert Martiniano at Griswold Heights. We separated into groups and began to solicit voters for absentee ballot applications. Kevin Mcgrath told me to send someone up to his district "who know what's going on". As far as I know Dan Brown and Tom Aldrich went to the North end of Troy to solicit. John Brown, Campana, LoPorto, and Martiniano went to North Central. They all stayed together because they didn't trust each other and were keeping an eye on each other. I stayed in Griswold Heights with Anthony DeFiglio and Gary Galuski. At about 4:00 or 5:00pm I had completed soliciting applications. I was at Northway Toyota in Latham, Gary Galuski had given me a ride up there to pick up my car. I received a telephone call from Robert Martiniano. Martiniano told me that John Brown was going to forge signatures. I told Martiniano that "I don't know what John Brown is doing, you're with him." At some time I received a phone call from Kevin McGrath. Kevin wanted to know how many applications we solicited from his

voter district. I told Kevin that I didn't have any idea how many we got from his district.

On Monday, September 14th, 2009 John Brown came to my office at Troy City Hall. We continued going over the applications and the numbers we needed. We compared the names on the registration list to the names on the applications we had solicited. I checked them off and we got a count. We made photocopies of all of the applications and I kept the copies. There is only one reason for us to make photocopies of the applications. Once a ballot is generated we need the copy of the application just in case we are not able to locate the voter to sign the ballot envelope. Should we not be able to locate a specific voter we can then use the application to either trace or copy their signature on the ballot envelope. John was at my office for about twenty minutes or so. John took all of the original applications over to the Board of Elections. I wasn't at the BOE, but it is my understanding that John left the applications with Ed McDonough. Ed called me later in the morning, at around 10:30 or 11:00 and told me that he was going to be bringing the ballots to me at my office. I was pissed off. I asked him "why the fuck are you bringing them to me, my name isn't on them." He said that Brown had left them in his office and told him to deliver them to me. When Ed McDonough delivered the Ballots to my office they were in a manila folder. The envelopes were open with the ballots inside. There were about thirty ballots in the envelope. McDonough and I went over the voter list. McDonough asked "how many do we have". I tallied in the 40's. This number included the ballots that I had given to Dan Brown on Friday

the 11th. I told Ed McDonough that he could probably get Brian Suozzo and Jermaine Joseph as well. I'm sure those two ballots never left the Rensselaer County Board of Elections office. When I say that they never left the Board of Elections office, I mean that applications were made and ballots generated and neither the application or the ballot ever left the BOE for the voter to see. They were forged. I told McDonough that I didn't have time to try to find all of the voters and get signatures on the ballots. I called Michael LoPorto, Clem Campana and John Brown. I told all of them that I wasn't going to get all of the ballot's signed myself and that I wanted them to meet me at Griswold Heights to get them done. I had plans for the evening, I had to cancel my plans, and I told them that if they wanted the WFP line they were going to have to help: I sent Tony Renna to Jackson St. to get the ballots for Joseph Mamone, Michael Mamone, Michelle Zillgit, and Jessica Boomhower signed. Me, Michael LoPorto, and Clem Campana started soliciting for signatures on the ballots. We did not have much success. I can only say for sure that Richard Gushlaw signed a ballot. John Brown arrived at some point while we were knocking on doors. I saw Tony Renna hand the four ballots from Jackson St. to John Brown. I was kind of following them and I heard Tony say to John Brown "do you have to do that in front of everyone." I asked John "what the hell are you doing". I believe that the handwriting in the date field on the four ballot envelopes from Jackson St. is John Brown's, I didn't actually see him complete the ballots. We knocked on some more doors, again without much luck. When we finished trying to get signatures I had the ballots

with me. We went to our cars and as we were all getting ready to leave one of the three, I can't remember which one, said "these are going in right? " I acknowledged the question with the response "I'm not turning them into the BOE" I Michael LoPorto told me that he would take care of it:

On Tuesday, September 15th, 2009 I left the ballots that I had received the previous day from Ed McDonough at my home when I went to work. Sometime around mid morning Michael LoPorto called me and asked me if the Ballots "were done yet". I told him no. In my mind I know that I didn't want to forge that many ballots with that many people involved in the plan. I knew that something was going to go wrong. I kept stalling and hoping that Michael or someone would call and say " give them to me and do it." That never happened. Michael called me again just prior to lunch time and asked me again. I told him no again and said that I was busy at work. I hoped he would ask for them, but he didn't. As the day went on I knew that I was going to have to do them because if I didn't, all three of them would know that I did not do it and I felt I would most likely lose my job. Sometime after getting back to the office from my lunch break I went home and forged the ballots and the ballot envelopes. I didn't want my DNA on them so I dipped my finger in water and wet the envelope seals that way. When I completed them I called Michael LoPorto and told him to meet me at City Hall. I gave the ballots to Michael at City Hall. They were in a manila envelope and he left with them.

On the Morning of the 15th of September I received a telephone call from either Kevin McGrath or John

Brown, I can't be sure who first called. They told me that Bob Mirch and the Deputy Mayor Dan Crawley had been out speaking to the voters who had absentee ballots at the BOE. That was the first indication that there was going to be problems with the election. Later in the day Kevin Mcgrath called me and asked me "how many from my district went in." I told him again that I didn't know.

During the following week Bob Mirch had one of his candidates, Christian Lambertson, initiate a Law suit to invalidate the absentee Ballots for the WFP and to look into the fraud. Ed McDonough came to my office at City Hall. He told me that Bob Mirch had hired a Private Investigation firm to investigate what had happened with the absentee ballots. Ed wanted to talk about a "strategy" to deal with the situation. He suggested going to Bob Mirch and trying to make some kind of deal to make the situation go away. I was not on board with going to Mirch. I told Ed he needed to just tell the truth. Ed told me that he was going to meet with the John Brown and some of the WFP people at LoPorto's later that day. I asked Ed if he really thought that it was a good idea to meet with the WFP. Ed and I met in Waterford the night before the civil hearing. I wanted to stay away from home and work so that I couldn't be served with a subpoena and have to testify in the Civil proceeding. It was some time during that week following the Primary that I decided that I needed to protect myself. I called the District Attorney, Rich McNally. Rich and I became friends during the 2007 election cycle when Rich was running for District Attorney and I was working for Party candidates. I told Rich that I needed to speak

to him, and that I didn't want to talk on the phone. Rich invited me up to his house in Valley Falls. We spoke on his porch. Rich told me that he had recused himself and had requested a Special Prosecutor. I told Rich that I needed a Lawyer who knew Election Law. Rich told me to hire Jim Long before anyone else did. The next day I was in Jim's office and I hired him to represent me. Jim told me to refer any Police that may want to interview me to him.

Once I had an Attorney representing me on the matter things were more quiet for some time. I didn't have much contact, other than City business, with any of the other persons involved in the Ballot Fraud. Sometime after I had heard that Anthony DeFiglio had been interviewed and told what he knew about the Ballot Fraud. I did ask Tony Renna to go and speak to Anthony. I asked Tony to tell Anthony to get a Lawyer and I also told him that we would try to get him some work after the whole Ballot Fraud thing was over. During that same time I received calls from Clement Campana, Michael LoPorto and John Brown. They were all concerned about how much Anthony knew about the Ballot Fraud, and how much he told the State Police. John Brown and his family even got so far as to find Anthony a job in Vermont. I think it was some type of maintenance job at a Motel. I did speak to Ed McDonough on occasions regarding his interviews with the State Police. I told Ed to just tell the truth. Following his first interview with the State Police Ed told me that he had told Inv. Ogden that he had left the ballots "at City Hall". I told Ed that he needed to tell the truth about that because Kevin O'Malley was with him and witnessed everything that happened.

NOTICE

Penal Law § 210.45 — IN A WRITTEN INSTRUMENT, ANY PERSON WHO KNOWINGLY MAKES A FALSE STATEMENT WHICH SUCH PERSON DOES NOT BELIEVE TO BE TRUE HAS COMMITTED A CRIME UNDER THE LAWS OF THE STATE OF NEW YORK PUNISHABLE AS A CLASS A MISDEMEANOR.

AFFIRMED UNDER PENALTY OF PERJURY

This _____ day of MONTH, 20 ___

OR

SUBSCRIBED AND SWORN TO BEFORE ME

September

This 30 day of MONTH, 20 11

STATEMENT END TIME: _____ ☒ AM ☐ PM

SIGNATURE OF DEPONENT, WILLIAM A. MCINERNEY /s/ William McInerney

/s/ James E. Long
JAMES E. LONG
Notary Public, State of New York
No. 02LO5037605
Qualified in Albany County
Commission Expires Jan. 3, 2015

OFFICE OF THE
DISTRICT ATTORNEY
COUNTY OF RENSSELAER
RENSSELAER COUNTY COURTHOUSE
TROY, NEW YORK 12180
(518) 270-4040

RICHARD J. McNALLY, JR.
DISTRICT ATTORNEY

September 24, 2009

Hon. Robert M. Jacon
Rensselaer County Court
Rensselaer County Courthouse
Troy, New York 12180

Re: Request for a Special Prosecutor
Investigation pertaining to Supreme Court
Index No.: 230629
Lambertsen v. Bugbee et al. filed 9-23-09

Dear Judge Jacon:

I am requesting the appointment of a Special District Attorney to prosecute the above-mentioned matter. County Law Section 701 authorizes a superior criminal court to appoint a Special Prosecutor when the District Attorney is disqualified from acting in a particular case to discharge his duties at a term of any court.

This matter involves a civil suit commenced in Supreme Court by the above referenced Plaintiff. Having reviewed the pleadings it appears that a criminal investigation is appropriate. In order to avoid the appearance of impropriety I make this request for a special prosecutor. As such, I am requesting that an appointment be made for all purposes, including investigation, prosecution and disposition.

I, therefore, respectfully request the appointment of a Special Prosecutor in the matter.

Very truly yours,

RICHARD J. McNALLY, JR.
District Attorney

STATE OF NEW YORK
COUNTY COURT
COUNTY OF RENSSELAER

IN THE MATTER OF AN INVESTIGATION PERTAINING TO RENSSELAER COUNTY SUPREME COURT INDEX NO. 230629, CHRISTIAN LAMBERSTEN V. LAWRENCE BUGBEE ET AL.

Filed: 9/28/09

ORDER

In the matter of an investigation pertaining to Rensselaer County Supreme Court Index No. 230629, Christian Lambersten. v. Lawrence Bugbee et al, and the District Attorney, having disqualified himself and his staff from acting in this case based on the speculation of politics and the appearance of impropriety and the court having determined this disqualification is appropriate, it is

ORDERED, that Y. Curtis Smith, Esq., whose address is Smith Hernandez, LLC, Rensselaer Technology Park, 105 Jordan Road, Troy, New York 12180-8376, is to act as Special District Attorney for all purposes in this matter up to and including the disposition of this case pursuant to Section 701(1)(a) of the County Law of the State of New York.

DATED: Troy, New York
September 28, 2009

/s/ Robert M. Jacon
HONORABLE ROBERT M. JACON
RENSSELAER COUNTY COURT JUDGE

STATEMENT

COUNTY OF RENSSELAER
TOWN OF NORTH GREENBUSH

I, KEVIN B. McGRATH, AGE: 39 BORN ON: / /71, AND RESIDING AT: 17 Red Rock Rd, Troy, NY 12182, HAVE BEEN ADVISED BY: Inv. A. W. FANCHER, OF THE NEW YORK STATE POLICE, OF THE FOLLOWING:

I HAVE THE RIGHT TO REMAIN SILENT AND I DO NOT HAVE TO MAKE ANY STATEMENT IF I DON'T WANT TO.

IF I GIVE UP THAT RIGHT, ANYTHING I DO SAY CAN AND WILL BE USED AGAINST ME IN A COURT OF LAW.

I HAVE THE RIGHT TO HAVE A LAWYER PRESENT BEFORE MAKING ANY STATEMENT OR AT ANY TIME DURING THIS STATEMENT.

IF I SHOULD DECIDE THAT I DO WANT A LAWYER AND CANNOT AFFORD TO HIRE ONE, A LAWYER WILL BE APPOINTED FOR ME FREE OF CHARGE AND I MAY HAVE THAT LAWYER PRESENT BEFORE MAKING ANY STATEMENT.

I ALSO UNDERSTAND THAT I HAVE THE RIGHT TO STOP AT ANY TIME DURING THIS STATEMENT AND REMAIN SILENT AND HAVE A LAWYER PRESENT.

I FULLY UNDERSTAND THESE RIGHTS AND AT THIS TIME, I AGREE TO GIVE UP MY RIGHTS AND MAKE THE FOLLOWING STATEMENT;

/s/ Kevin McGrath

WITNESS SIGNATURE

I am here at the office of Attorney Trey Smith with my Attorney Peter Moschetti regarding the Rennselaer County Absentee Ballot investigation. I am speaking with Inv. Albro Fancher and Inv. John Ogden of the New York State Police and I fully understand my rights and make the following statement.

I'm looking at a photocopy of and recognize the absentee ballot application and absentee ballot envelope of THOMAS D. DICKINSON. As I review Mr. DICKINSON's paperwork, I recall Mr. DICKINSON signing his name to the absentee ballot application. I wrote DICKINSON's name and address in the upper left corner along with the name RICK MASON on the deliver to line. When I brought the application to the Board of Elections on 8/24/10, EDWARD McDONOUGH pointed out that the "Dates you will be out of Rensselaer County" and "Where you will be on Election Day" lines were not filled out on the application. I told McDONOUGH that ~~he was a~~ DICKINSON is a screen printer and I watched McDONOUGH fill in the dates and "Screen Printing Conference in Syracuse" on the form. I later saw DICKINSON at Corliss Park and he signed his ballot envelope and gave me his consent to vote Democratic on his ballot which I did.

I am looking at a photocopy of and recognize the absentee ballot application and absentee ballot envelope of JENNIFER M. TAYLOR. As I review Ms. TAYLOR's paperwork, I recall Ms. TAYLOR signing

her name to the absentee ballot application and filling out her name and address in the upper left hand corner. I wrote RICK MASON's name on the deliver to line. When I brought the application to the Board of Elections on 8/24/10, EDWARD McDONOUGH pointed out that the "Dates you will be out of Rensselaer County" and "Where you will be on Election Day" lines were not filled out on her application. I told McDONOUGH that she told me where she would be, but I could not remember where she said. I watched McDONOUGH write in the dates and "visiting family in Massachusetts" on the application. I later saw TAYLOR at Corliss Park and she signed her ballot envelope and gave me her consent to fill out her ballot and vote for myself, which I did.

I'm looking at a photocopy of and recognize the absentee ballot application and absentee ballot envelope of JOHN H. GILBERT Jr. As I review Mr. GILBERT's paperwork, I recall Mr. GILBERT's wife signing his name to the absentee ballot application at their residence. JOHN was embarrassed about his literacy and had his wife sign his name for him. I wrote JOHN's name and address in the upper left hand corner and MIKE LEONARD on the release to line for JOHN. I can't specifically recall who wrote JOHN's date of birth and "South Yarmouth Cape Cod" but that is not my writing. I later returned to JOHN GILBERT's residence and he signed his ballot envelope and gave me his consent to fill out his ballot and vote for myself, which I did. I have known JOHN GILBERT for as many as ten years through playing flag football against him.

I'm looking at a photocopy of and recognize the absentee ballot application and absentee ballot envelope of STEVE CARPENTER. As I review Mr. CARPENTER's paperwork, I recall STEVE CARPENTER signing his name to the absentee ballot application in my presence. I printed the rest of the information on the application which includes STEVE's name and address in the upper left hand corner, my name on the release to line for STEVE and Frost Acres Campground which was where he said he would be. I later saw STEVE and he signed his ballot envelope. I completed the ballot with his direct consent to do so. I then licked the envelope and mailed it to the BOE as I did with all of the ballots. I have known STEVE CARPENTER for 12-15 years as we use to work together at Playtex in Watervliet.

I'm looking at a photocopy of and recognize the absentee ballot application and absentee ballot envelope of LLOYD L. NEWELL. As I review Mr. NEWELL'S paperwork, I recall LLOYD NEWELL signing his name to the absentee ballot application in my presence along with his incorrect (former) address in the upper left hand corner of the form. LLOYD completed everything on the form with the exception of the name TOM ADLRICH which I printed on the release to line. The old address is crossed out on the form and his current address of 829 3rd Ave was later added on the form. I remember asking ED McDONOUGH if LLOYD's correct address could be added as he told me after the fact that his correct address is 829 3rd Ave. I can't say for sure that McDONOUGH was the person who actually made that correction on the application. I later saw LLOYD NEWELL and he and I together

completed the ballot. LLOYD signed the ballot. I then licked the envelope and mailed the ballot to the BOE. I know LLOYD NEWELL because he went to high school with my daughter.

I'm looking at a photocopy of and recognize the absentee ballot application and absentee ballot envelope of JOSEPH M. WILEY. As I review Mr. WILEY's paperwork, I recall being at JOSEPH WILEY's residence and him signing his name to the absentee ballot application and writing that he would be in Lake George. I printed the rest of the information on the application which includes JOSEPH's name and address in the upper left hand corner and MIKE LEONARD on the release to line. I may have written the date next to his signature but can't say for sure. I later saw JOSEPH at his house on 8th Ave and he signed his ballot envelope. I completed the ballot with JOSEPH. I then licked the envelope and mailed it to the BOE.

I'm looking at a photocopy of the absentee ballot of application and absentee ballot envelope of YARELIS GONZALEZ. I spoke with YARELIS prior to the September 2009 primary and helped her fill out a voter registration card. That was the only contact I had with her prior to the September 2009 primary. I did not go to her with an absentee ballot application but her name would have been on a list of friendly's that was present the Saturday prior to the Primary when TOM ALDRICH and DANNY BROWN canvassed Corliss Park.

I'm looking at a photocopy of the absentee ballot application and absentee ballot envelope of MARC W. WELSH. I have known MARC all my life and

grew up with his brother. I did not fill out the application with MARC but did introduce DAN BROWN and TOM ALDRICH to MARC WELSH the Saturday prior to the September Primary. They filled out an application with him at that time. I later saw MARC with his absentee ballot and he signed his ballot envelope. I completed the ballot with MARC with his direct consent because he has trouble writing. I licked the envelope and mailed the ballot to the BOE for MARC.

The above mentioned voters are the voters that I had direct contact with prior to the September 2009 WFP primary in Rensselaer County. The weekend prior to the September 2009 WFP Primary, I believe I was told by MAC (BILL McINERNEY) that there was a meeting at Grizwold Hights on Saturday September 12, 2009 to solicit support and Absentee Ballot Applications for the WFP. That morning, I went to Grizwold Hights where I saw the candidates: JOHN BROWN, ROBERT MARTINIANO, CHAPPY (CLEM CAMPANA), MICHAEL LoPORTO, and GARY GALUSKI. Also there that day were democratic volunteers TOM ALDRICH and TONY DeFIGLIO, DAN BROWN and MAC. That morning, I gave MAC and DAN BROWN a list of friendly's to solicit from my district which is District 1. I told MAC and DAN BROWN to send someone who knew how to fill out the paperwork correctly. DAN BROWN took the list from me and went to District 1 with TOM ALDRICH to solicit the friendly's on my list. A friendly is a voter that is registered to vote and would be supportive of myself, the Democratic Party or a candidate endorsed by the Working Family's Party. After handing off the list, I left as I

had other things to do that day. When I left, everyone was still standing in a circle including DAN BROWN and TOM ALDRICH. The purpose that day was to solicit registered WFP voters for support in the upcoming primary and to offer Absentee Ballot Applications.

Later that day I met with DAN BROWN and TOM ALDRICH at Corliss Park in the afternoon to see what kind of support they got. I believe DAN told me that they had obtained roughly four to six absentee ballot applications that day. I knew that the applications would have had to of come from my friendly list. During this time I introduced them both to MARC WELCH. They did not originally approach MARC because he had a BOB MIRCH sticker on his door. I never took possession of any absentee ballots that day.

On the afternoon of the day prior to the primary, Monday September 14th, 2009, I was at the Board of Elections to verify the number of my friendly absentee ballots to those friendly to the Republicans and BOB MIRCH. I would say this was between 4 pm and 5pm that day after I got out of work. When I went in, JOHN BROWN was in ED McDONOUGH's office at the BOE. I walked into the office. The discussion ED and JOHN were having centered around the need to have names listed on each of the absentee ballot applications which signified who each corresponding ballot could be released to. I took this to mean the release to names were blank on the absentee ballot applications they were speaking about. During this conversation the name of the WFP chairperson JIM WELCH came up as a name that could be entered on the release to line on the

absentee ballot applications. I remember JOHN BROWN having JIM's number and calling him from his cell phone in McDONOUGH's office. I do not recall JOHN ever claiming the number of applications to JIM at he wanted to enter JIM's name on. At this point, it became clear to me that to be able to solicit the actual voters for whom each application was received in order to generate an absentee ballot was an impossible task. I knew from the conversation that McDONOUGH and BROWN were having because there were roughly 35 applications that they were talking about. I do not remember if it was McDONOUGH or BROWN that mentioned the number 35. I had done a lot of work obtaining absentee ballot applications prior to this so I knew it would be difficult to track people down with the actual ballots like I had done. I was not sure who had the applications at that point because I saw them so I told them both to make sure that they didn't mess with the voters from District 1. I specifically mentioned MARC WELCH and told them both that his excuse was that he was a diabetic and had trouble ~~working~~ walking. I knew his application was in the pile because I had seen it on Saturday when I met with DAN BROWN and TOM ALDRICH at Corliss Park. I had also seen ED McDONOUGH fill in the blank excuses on the applications of DICKINSON and TAYLOR back in August.

At that point, ED McDONOUGH told JOHN BROWN and I to leave his office because we were candidates. JOHN and I left and made small talk as we left. When ED McDONOUGH asked JOHN and I to leave, I took that to mean that JIM WELCH's name would be placed on the release to line of the 35

absentee ballot applications that JOHN BROWN and ED McDONOUGH were speaking about that day and he didn't want us there when it happened.

Later that night, I had ~~a~~ called MAC to make sure that the friendly's who were solicited in District 1 actually received their absentee ballots. I made this call because of what I had heard in McDONOUGH's office earlier and my knowledge of the absentee ballot process. MAC told me that 2 or 3 of them were going in. I took that to mean that 2 or 3 voters could not be located to fill out their absentee ballots but that the ballots would be sent into the BOE anyway. I wasn't happy about the votes going in but can't remember what I said to MAC.

I spent the next day, Primary Day, making sure everyone got to the poles and checking numbers at the polls. Everything that day for me was oriented to getting the voters to the polls.

I believe that a day or two later, Wednesday 9/16/09 or Thursday 09/17/09, the news media started reporting on the fraudulent absentee ballots and interviewing voters who had absentee ballots submitted in their names.

At some point after the media became involved, I called ED McDONOUGH and asked him what was going on with the ballots. McDONOUGH said they fucked up. When Ed said ~~they~~ they, I took that to mean MAC, DAN BROWN and JOHN BROWN. I believe that MAC, DAN and JOHN were behind the fraudulent votes. I think ED regretted that it happened and that he didn't stop it. ED could have stopped the whole thing when he asked JOHN BROWN and I to leave his office that Monday prior

to the primary. As the Democratic Commissioner of the BOE, that is his job.

In the following months, everyone involved was being interviewed by the State Police. I had several conversations with ED McDONOUGH during this time period. During one of these conversations, ED McDONOUGH told me that he told Inv. OGDEN that he had personally delivered absentee ballots to MAC's office in Troy City Hall and left them on his desk. It would have had to be after I left ED's office on the afternoon of Monday 9/14/09 but prior to my call to MAC later that night.

At some point after the primary but before the election, I had a conversation with SAHAR COUCH of the state chapter of the WFP. She came up to me after the meet the candidates' night CYO Center. I told her that I did not have anything to do with the fraudulent absentee ballots. I told her I kept my word and was going to give her back her party in Lansingburgh.

I HAVE BEEN ADVISED BY INVESTIGATOR FANCHER THAT GIVING A FALSE WRITTEN STATEMENT IS A CRIME AND THAT I CAN BE ARRESTED FOR MAKING A FALSE WRITTEN STATEMENT. I HAVE READ THIS ENTIRE STATEMENT AND EVERYTHING I HAVE SAID IN THIS STATEMENT IS THE TRUTH TO THE BEST OF MY KNOWLEDGE. (END OF STATEME

NOTICE

(NYS Penal Law Sec. 210.45)

IN A WRITTEN INSTRUMENT, ANY PERSON WHO KNOWINGLY MAKES A FALSE STATEMENT WHICH SUCH PERSON DOES NOT BELIEVE TO BE TRUE HAS COMMITTED A CRIME UNDER THE LAWS OF THE STATE OF NEW YORK PUNISHABLE AS A CLASS A MISDEMEANOR.

AFFIRMED UNDER PENALTY OF PERJURY
THIS 29th DAY OF March, 2010

SIGNATURE OF DEPONENT
/s/ Kevin McGrath

OR

SUBSCRIBED AND SWORN TO BEFORE ME

THIS _____ DAY OF _____, 2010

SIGNATURE OF WITNESS

NAME OF PERSON TAKING STATEMENT

STATE OF NEW YORK
SUPREME COURT
COUNTY OF RENSSELAER

THE PEOPLE OF THE STATE OF NEW YORK

-against-

EDWARD McDONOUGH and MICHAEL LOPORTO,

Defendants.

Filed: 3/1/12

Decision & Order

Indictment #SP11-1002
Index #235598

APPEARANCES:

Trey Smith, Esq., Special District Attorney; Matthew C. Hug, Esq., Special District Attorney

Brian D. Premo, Esq., Attorney for Edward McDonough

Michael A. Felt, Esq., Attorney for Michael LoPorto

Pulver, J.

Defendants Edward McDonough ("McDonough") and Michael LoPorto ("LoPorto") (collectively,

"defendants") move in limine to dismiss the indictment or certain counts therein based on alleged prosecutorial misconduct during Grand Jury proceedings.[1] In the alternative, defendants seek a plenary hearing. In addition, during the trial, McDonough sought to have introduced into evidence exhibits marked McDonough's BB, CC, DD; the Court reserved ruling. The People oppose these applications. After first making an oral application for dismissal during a conference outside of the Jury's presence, the Court directed written submissions. Following review of the same, on February 6, 2012, in open court but outside the presence of the Jury, the Court entertained oral argument and now issues its decision and order.

Factual and Procedural Background

In January 2011, a Grand Jury indicted McDonough on 38 counts of Forgery in the Second Degree (Penal Law § 170.10 [2]) and 36 counts of Criminal Possession of a Forged Instrument in the Second Degree (Penal Law § 170.25). In the amended indictment stemming from the same Grand Jury proceeding, LoPorto stands indicted on 29 counts of Criminal Possession of Forged Instrument in the Second Degree (Penal Law § 170.25). As part of the Grand Jury proceedings, the Special District Attorney ("SDA") presented certain affidavits executed by witnesses pursuant to CPL 190.30 (3)[2]

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[1] At the oral argument, LoPorto sought, alternatively, disqualification of the SDA.

[2] CPL 190.30 (3) allows an affidavit to be submitted to the grand jury in lieu of testimony where forgery is involved and where such statement (affidavit) is given under oath.

("190.30 affidavit") to the Grand Jury. During this criminal trial, two witnesses, Jermaine Joseph and Jolene VanVranken, denied that they signed such affidavits while other witnesses acknowledged executing the 190.30 affidavits.

As to Ms. VanVranken, McDonough sought to introduce into evidence the following three exhibits regarding Ms. VanVranken: (1) marked McDonough's BB, consists of her signature as provided by her on the witness stand during cross examination; (2) marked McDonough's CC, consists of her "Supporting Deposition" given to the State Police on December 2, 2009; and (3), marked McDonough's DD, is a copy of her 190.30 affidavit. McDonough sought introduction of these exhibits to demonstrate that the signature on Ms. VanVranken's 190.30 affidavit varies from her signature on her statement to the police, which she acknowledged as hers, and her signature given at the trial. The People objected on relevancy grounds. The Court reserved decision.

Earlier, as part of their omnibus motions, defendants moved to dismiss the indictment, inter alia, on grounds of prosecutorial misconduct and insufficient evidence, relying, in part, on CPL 210.35 (5) and in further motions sought to have the SDA disqualified, in part, on grounds alleging conduct on his part. The Court denied those motions. In essence, defendants' joint motion now is a renewal of those prior motions based, in part, on the new information discussed above that has come to light during the trial. The Court will entertain this motion to the extent discussed below.

Dismissal Motion

Defendants contend that the indictment should be dismissed due to prosecutorial misconduct during the Grand Jury proceedings that has impaired the integrity of those proceedings and prejudiced defendants: Pursuant to CPL 210.20 (1) (c), a court may dismiss an indictment or any count thereof, inter alia, on the ground that the grand jury proceedings were defective within the meaning of CPL 210.35.

CPL 210.35 (5) provides that a grand jury proceeding is defective when "otherwise fails to conform to the requirements of article [190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]). In interpreting this provision, the Court of Appeals has held:

> Dismissal of indictments under CPL 210.35 (5) should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury. The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment and the degree of inappropriate prosecutorial influence or bias

(People v Huston, 88 NY2d 400, 409; see People v Moffitt, 20 AD3d 687, 688, lv denied 5 NY3d 854; People v D'Amico, 261 AD2d 633, lv denied 93 NY2d 1016). Further, "the question whether a particular presentment was so improper as to impair the

integrity of the Grand Jury proceeding and to create the potential for prejudice has always been treated as a question of law" (People v Adessa, 89 NY2d 677, 685).

Defendants base their argument for dismissal on the SDA's alleged: (1) submission of 190.30 affidavits to the Grand Jury that were forged, (2) failure to properly swear in the affiants during the execution of the 190.30 affidavits, and (3) lack of authority to administer an oath to the 190.30 affiants. Defendants maintain that such conduct violates their due process rights. The SDA denies such allegations.

Alleged Forgeries

Defendants contend that the 190.30 affidavits of the following persons have been forged: (1) Jermaine Joseph, (2) Jolene VanVranken; (3) Demetrius Banks; (4) Jessica Boomhower; (5) Lisa Chum; (6) Michael Rebel, and (7) Barton Ward. Defendants submit various exhibits in an attempt to show that the signatures on the 190.30 affidavits for these individuals differs from their signatures on, Inter alia, their voter registration cards. Defendants suggest that the SDA either forged the affidavits or notarized them outside of the presence of the witnesses.

First, the Court notes that, as to the 190.30 affidavits of Jermaine Joseph, Demetrius Banks, Jessica Boomhower, and Lisa Chum, such are not at issue in this matter since they were never submitted to the Grand Jury as these voters testified in front of that panel. With regard to Ms. VanVranken, while she denied that she executed the 190.30 affidavit during her cross examination, comparison of that

document with her voter registration card, which she affirmatively testified that she had signed, reveals that the signatures are very similar. Also, her signature on page two her State Police statement, which she testified she signed, is similar to her signature on the 190.30 affidavit. Further, review of the other witnesses' disputed signatures on the 190.30 affidavits in comparison with voter registration cards does not reveal such discrepancies between these documents at to warrant further inquiry.[3]

Furthermore, the SDA swore before the Court that he did not "forge" or execute any affidavit in place of any witness. In addition, the SDA at oral argument and in his affirmation has painstakingly explained the procedure he implemented in having witnesses execute 190.30 affidavits, For instance, the SDA explained that he asked the affiants to review each prepared affidavit, including the attached documents, as the affidavit was going to be a sworn document, and "by signing [the affiants] would be swearing that all of that was true to the best of their knowledge." He further noted that he then individually spoke with each affiant, witnessed the individual sign the document, and affixed his notary stamp on the document in front of the affiant. Given this testimony and the exhibits presented by the parties, the Court rejects defendant's argument premised on prosecutorial misconduct regarding alleged forgery of witness 190.30 affidavits to

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[3] During cross-examinations of voter witnesses, the Court allowed defendants to explore circumstances surrounding the execution of 190.30 affidavits.

warrant the exceptional remedy of dismissal of the indictment or any specific counts therein or, alternatively, disqualification of the SDA (see People v Davis, 83 AD3d 1210, 1211-1212, lv denied 17 NY3d 794; People v Bean, 66 AD3d 1386, 1386, lv denied 14 NY3d 769; People v D'Amico, 261 AD2d at 634). Moreover, Grand Jury proceedings enjoy a presumption of regularity, which has not been overcome here (see People v Nash, 69 AD3d 1113, 1114-1115, lv denied 15 NY3d 754).

Oath

Defendants also contend that the SDA failed to swear in the witnesses, which amounts to misconduct on his part affecting both the integrity of this proceeding and the sufficiency of evidence underpinning the indictment. As noted earlier, CPL 190.30 (3) allows an affidavit to be submitted to the grand jury in lieu of testimony where forgery is involved and where such statement (affidavit) is given under oath. "Oath" is defined by CPL 1.20 (38) to "include an affirmation and every other mode authorized by law of attesting to the truth of that which is stated" (see also Penal Law § 210.00 [1]; General Construction Law § 36). Furthermore, "the form of an oath is flexible and is deemed sufficient so long as it is calculated to awaken the conscience and impress the mind of the person taking it in accordance with his or her or religious or ethical beliefs" (People v Wilson, 255 AD2d 612, 613, lv denied 93 NY2d 981; see Matter of Breanna M., 23 Misc 3d 341, 343; CPLR 2309 [b]), Furthermore, an oath is "designed to serve two discrete functions: to alert the witness to the moral duty to testify truthfully and to deter false testimony by

establishing a legal basis for a perjury prosecution" (People v Parks, 41 NY2d 36, 45; see also Matter of Breanna M., 23 Misc 3d at 343; People v Penaflorida, 2011 NY Slip Op 21385 at ***3-5).

Here, after hearing argument on this issue and reviewing the parties' submissions, the Court is satisfied that the witnesses executing the 190.30 affidavits were properly sworn (accord People v Holmes, 93 NY2d 889, 891; People v Chasey, 5 AD3d 815, 816, lv denied 2 NY3d 787; cf Matter of Neftali D., 85 NY2d 631, 636). In particular, the SDA noted both at oral argument and in his affirmation that he explained the significance of the document that was being signed, that by signing the document the witnesses was attesting to the truth of the same, and that there were legal consequences for not telling the truth in the affidavit. Accordingly, the Court rejects this argument as a basis to dismiss the indictment. Further, the Court finds unavailing defendants' assertions that the SDA or his staff was coaching a witness or witnesses to testify that they had been administered an oath prior to executing the 1903.0 affidavit, which the witness unequivocally testified that she signed.

As to defendants' argument that the SDA lacks authority to administer an oath, the Court agrees with the People that this branch of the motion is untimely (see CPL 255.20) since defendants have been in possession of the 190.30 affidavits for at least a year that reflected that the SDA had notarized the majority of them and never moved for dismissal on this basis (see People v Peryea, 68 AD3d 1144, 1146, lv denied 14 NY3d 804; People v Crockett, 30 AD3d 768, 769-770, lv denied 7 NY3d 866; People v Selby,

53 AD2d 878, 878, affd 43 NY2d 791). In any event, the Court rejects this argument on the merits (see Executive Law § 135; see also Penal Law § 210.00 [6]; People v Penaflorida, 2011 NY Slip Op 21385 at ***3). Furthermore, nothing here suggests that the SDA has an interest in this litigation to prevent him from administering such an oath (see generally Matter of Harte v Kaplan, 87 AD3d 813, 814; Brodsky v Board of Mgrs., 1 Misc 3d 591, 596-597).

Admission of Evidence

McDonough seeks admissions of exhibits marked McDonough's BB, CC, and DD. He contends that such evidence should be admitted as it is relevant to the issues in this case as discussed above. The People object to this evidence, arguing it is not relevant to the trial issues — namely, whether McDonough and LoPorto are guilty of the charges in the amended indictment The Court agrees with the People (see People v Aska, 91 NY2d 979, 981-982; People v Scarola, 71 NY2d 769, 777]) especially in light of the Court's determination on defendants' dismissal application. Further, even if such evidence could be considered somehow relevant, the probative value of such evidence would be outweighed by its potential to lead to jury confusion in a case that already requires a determination on over 70 counts and the weighing of testimony of over 50 witnesses (see People v. Scarola, 71 NY2d at 777). Accordingly, the Court denies admission of McDonough's exhibits marked BB, CC, and DD.

Conclusion

In sum, the Court denies defendants' applications in their entirety. The foregoing constitutes the decision and order of this Court.

Dated: ~~February~~ March 1st, 2012
Troy, New York

/s/ George J. Pulver, Jr.
HON. GEORGE J. PULVER, JR.
Acting Supreme Court Justice

GEN-4 (03\05)
New York State Police
SUPPORTING DEPOSITION (CPL § 100.20)
PAGE ___ OF ___

THE PEOPLE OF THE STATE OF NEW YORK
— VS.

_____

_____

DEFENDANT(S)

LOCATION OF INCIDENT:
STATE OF NEW YORK LOCAL COURT
COUNTY OF RENSSELAER
CITY OF TROY

LOCATION OF DEPOSITION:
STATE OF NEW YORK
COUNTY OF RENSSELAER
CITY OF TROY

On [DATE: 12/02/2009] at [TIME STARTED: 2:20 PM] I, [FULL NAME: Jolene M. Van Vranken, / /75] state the following: I am speaking to Inv. John Owen of the New York State Police. I currently reside at 14 Lockwoods Road, in the Town of Pittstown, Rensselaer County. I have lived here since this past June. I moved here from 510 Griswold Heights in the City of Troy.

Approximately a year & a half ago I was asked by a friend to register with the Working Families Party in the City. I did register with them as a favor. That was the first time I registered with any ~~party~~ political party. I was asked to vote for a candidate. The only time I ever voted was in the Fall of 2008. I have never voted other than that. Inv. Ogden has asked me if I was ever approached & asked to complete an application for an absentee ballot regarding the Troy City Council elections or if I ever completed an absentee ballot for any election in Troy & specifically for the WFP Primary this past September. I would like to say that since I moved out of Troy in June I have not lived at the address of 510 Griswold Heights. Since then, I have never asked for, or completed an absentee ballot application, and I have never completed an absentee ballot. If there is an absentee ballot application or ballot in my name in possession of the Board of Elections or the State Police regarding the WFP primary this past September they are both forged without my consent. I gave no person license or privilege to use my name or to sign my name to <u>any</u> election document.

I have read the notice on this deposition. I do understand it & I swear that this is a true statement. End.

<u>/s/ Jolene M. Van Vranken</u>

Statement ends @ 2:37 PM

NYSP Twp "C"

SP Brunswick

NOTICE

(Penal Law § 210.45)

In a written instrument, any person who knowingly makes a false statement, which such person does not believe to be true has committed a crime under the laws of the state of New York punishable as a Class A Misdemeanor.

Affirmed under penalty of perjury

This 2nd day of December, 2009

-OR-

* Subscribed and Sworn to before me this ___ day of _____, ___

/s/ Jolene M. Van Vranken
(SIGNATURE OF DEPONENT)

/s/ [ ] Van Vranken
(WITNESS)

Inv. John J. Ogden

TIME ENDED: 2:37 pm

STATE OF NEW YORK
SUPREME COURT
COUNTY OF RENSSELAER

THE PEOPLE OF THE STATE OF NEW YORK

-against-

EDWARD MC DONOUGH and MICHAEL LO PORTO,

Defendants.

Indictment #SP11-1002

TRIAL TESTIMONY OF JOLENE VAN VRANKEN

County Courthouse
Congress and Second Streets
Troy, New York 12180
January 31, 2012.

Before:

HONORABLE GEORGE J. PULVER, JR.,
Acting Supreme Court Justice.

Appearances:

For the People:
TREY SMITH, ESQ., Special District Attorney,
Rensselaer County, and MATTHEW C. HUG, ESQ.
Special Assistant District Attorney,

105 Jordan Road
Troy, New York.

For Defendant McDonough:
BRIAN D. PREMO, ESQ.
20 Corporate Woods Boulevard
Albany, New York.

For Defendant LoPorto:
MICHAEL A. FEIT, ESQ.
383 Clinton Avenue
Albany, New York.

EDWARD MC DONOUGH, Defendant, in person.
MICHAEL LO PORTO, Defendant, in person.

JOLENE VAN VRANKEN, after first having been duly sworn by the Clerk of the Court, was examined and testified as follows:

THE CLERK: This sworn witness is Jolene, J-O-L-E-N-E, VanVranken, V-A-N-V-R-A-N-K-E-N.

THE COURT: All right, sir, your witness.

DIRECT EXAMINATION

BY MR. HUG:

Q. Good morning, Ms. VanVranken. Could you please state your name for the jury?

A. Jolene VanVranken.

Q. Ms. VanVranken, where do you live?

A. I live in Pittstown, New York.

Q. In September, 2009, did you live in the City of Troy?

A. No.

Q. Do you know when you moved out of the City of Troy?

A. In the summer of 2009, June.

Q. Okay. Ma'am, are you registered to vote? Were you registered to vote in 2009?

A. I was registered, yes.

Q. Do you remember when you registered?

A. In 2008.

MR. HUG: Your Honor, I would like to admit People's Exhibit 127 on the stipulation of the parties as the certified voting registration form of Ms. VanVranken.

THE COURT: So admitted subject to marking.

Q. Ms. VanVranken, can you flip to the second page of that document? Is that the voter registration card for 2008?

A. Yes.

Q. Is that your handwriting?

A. Yes.

Q. Is that your signature at the bottom?

A. Yes.

Q. Did you mark which party you wanted to join?

A. Yes.

Q. Which party was that?

A. Working Families Party.

Q. Could you briefly tell me how it was that you came to be registered to vote?

A. Um, I was working at the Hoosick Street Hess Mart. I had been working there for several years, and Bob Mirch had asked me to -- he asked me if I was registered to vote; I said no. He asked me if I could vote for one of his candidates, and I said yes.

Q. How did you know Mr. Mirch?

A. He was a regular into the store and also was a friend of the owners.

Q. Aside from this business relationship, did you have any other relationship with Mr. Mirch?

A. No.

Q. Were you politically active?

A. No.

Q. After you signed that, did he take the voter registration form from you?

A. Yes.

Q. In that election of 2008, did you vote?

A. Yes.

Q. Did you vote by absentee ballot?

A. No. I went to Carroll Hill School and voted.

Q. Did you go to the polls?

A. Yes.

Q. Went into the booth and pulled the lever?

A. Yes.

Q. And then beginning of summer of 2009, you moved out of Griswold Heights?

A. Yes.

MR. HUG: Your Honor, may I approach?

THE COURT: Yes, you may.

MR. HUG: At this time, the People would admit People's Exhibit 128A, on stipulation of the parties, a colored copy of the absentee ballot application submitted in the name of Jolene VanVranken.

THE COURT: It may be so admitted subject to marking.

Q. Ms. VanVranken, did you ever receive this application?

A. No.

Q. Did anyone ever come to you in Pittstown and ask you to sign an absentee ballot application so you could vote in a Troy election?

A. No.

Q. Do you see the handwriting at the top of that form?

A. Yes.

Q. Do you see your name?

A. I do.

Q. What address is it?

A. 510 Griswold Heights, Troy, New York, 12180.

Q. Was that your address in September of 2009?

A. No.

Q. Is that your proper birth date; _____, 1975?

A. Yes.

Q. Do you see that there's some red initials there at the top of the form?

A. Yes.

Q. Could you say what those initials are?

A. OTC with a P underneath it.

Q. Do you know what that means?

A. No.

Q. Do you see the name of Brant Caird as the deliver to person?

A. Uh-huh.

Q. On the ballot?

A. Yes.

Q. Do you know Brant Caird?

A. No.

Q. Did you direct anybody to fill that in for you?

A. No.

Q. To deliver that ballot in Troy to Brant Caird?

A. No.

Q. Do you see the next section, where it says you are going to be absent from Rensselaer County because of temporary illness because of knee surgery?

A. Yes.

Q. Did you have knee surgery?

A. No.

Q. Did you ever have knee surgery?

A. No.

Q. Did you write knee surgery on there?

A. No.

Q. Did you direct anyone to do that for you?

A. No.

Q. Do you see the signature that's purported to be yours at the bottom of the document?

A. Yes.

Q. Is that your signature?

A. No.

Q. Does it look like your signature?

A. No, not even close.

Q. Did you direct anybody to sign this on your behalf?

A. No.

Q. And the date there, 9/12/09, did you write that?

A. No.

Q. Did you direct anybody to write that for you?

A. No.

MR. HUG: Your Honor, may I approach the witness?

THE COURT: Yes, you may.

MR. HUG: The People would like to admit People's Exhibit 129A on the stipulation of the parties. It is a four-page document, a colored photocopy of the absentee ballot envelope and absentee ballot submitted in the name of Jolene VanVranken.

THE COURT: Such may be admitted subject to marking.

Q. Ms. VanVranken, first page of that document, set of documents is the front of an envelope; is it not?

A. Yes.

Q. Have you ever seen that envelope?

A. No.

Q. You didn't receive that in the mail?

A. No.

Q. Do you see the computer printout at the top of that envelope?

A. Yes.

Q. Do you see your name?

A. Yes.

Q. What address do you see?

A. 510 Griswold Heights, Troy, New York, 12180.

Q. Was that your addr[illegible] in September of 2009?

A. No.

Q. Do you see any postage on that envelope?

A. No.

Q. Do you see a received stamp, a date and time stamp there from the Rensselaer County Board of Elections?

A. Yes.

Q. And is it September 15, 2009, at 3:07 p.m.?

A. Yes.

Q. Did you deliver that -- did you hand deliver that to the Board of Elections?

A. No. I don't even know where that is.

Q. You don't know where the Board of Elections is?

A. No.

Q. Could you go to the second page, please? Do you see the back of the envelope?

A. Yes.

Q. Do you see a date written down at the bottom?

A. Yes, September 14, 2009.

Q. Did you write that at the bottom?

A. No.

Q. Did you direct anybody to write it for you?

A. No.

Q. Do you see your signature on the other form?

A. That's not my signature.

Q. Does it look like yours?

A. No.

O. Did you direct anybody to write it for you?

A. No.

Q. Can I have you skip over Page 3? Go to the last page. Do you see a ballot, a paper ballot?

A. Uh-huh.

Q. And that's for the primary election on September 15, 2009?

A. That's what it says.

Q. Do you see a box there at the far right? It says, "Working Families, 36th Election District, city, town." It says Troy?

A. Yes.

Q. And you never received this at all?

A. No.

Q. And do you see that there's a bar there, a list of names of candidates with little boxes that you can mark, you know, candidates of your choosing?

A. Yes.

Q. Did you mark this?

A. No.

Q. Did you direct anybody to mark this?

A. No.

Q. Did you intend at any time to vote in the City of Troy for Michael LoPorto, John Brown or Clem Campana?

A. I don't know who they are.

MR. HUG: Thank you. I have no further questions.

CROSS-EXAMINATION

BY MR. PREMO:

Q. Good afternoon.

A. Hello.

Q. Ms. VanVranken, my name is Brian Premo. We have never met before; have we?

A. No.

Q. How old are you?

A. I will be 37 in February.

Q. Back in 2007, was your handwriting the same as it is today?

A. Yes.

Q. Back in 2009, was your handwriting the same as it is today?

* * *

No. 18-485

IN THE
Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor (as the majority of circuits has held) or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use (as the Second Circuit held below).

PARTIES TO THE PROCEEDING

Edward G. McDonough, petitioner on review, was the plaintiff-appellant below.

Youel Smith, individually and as Special District Attorney for the County of Rensselaer, New York, AKA Trey Smith, respondent on review, was the defendant-appellee below.

John J. Ogden, Richard McNally Jr., Kevin McGrath, Alan Robillard, County of Rensselaer, John F. Brown, William A. McInerney, Kevin F. O'Malley, Daniel B. Brown, and Anthony J. Renna were defendants below, but are not parties to this petition.

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IN THE

Supreme Court of the United States

No. 18-485

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
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BRIEF FOR PETITIONER

INTRODUCTION

To "depriv[e] a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured" is "inconsistent with the rudimentary demands of justice." *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (per curiam). That is especially so when a state official himself fabricates the false evidence. "The principle that a State may not knowingly use false evidence" is "implicit in any concept of ordered liberty." *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959).

Petitioner Edward McDonough endured what the Constitution "cannot tolerate." *Miller* v. *Pate*, 386 U.S. 1, 7 (1967). He twice stood trial—and was ultimately acquitted—on dozens of criminal charges based on fabricated evidence. Much of the evidence was fabricated by Respondent Youel Smith, the prosecutor in McDonough's case. Smith's conduct was egregious: He forged witness affidavits in a pre-trial investigation and falsified other evidence presented in grand jury proceedings and at both of McDonough's trials. A state investigator working with Smith, in addition to several witnesses—many of whom ultimately pled guilty on criminal charges—also fabricated evidence at Smith's urging.

McDonough's first trial ended in a mistrial, and Smith chose to try McDonough a second time. On December 21, 2012, at the end of his second trial, McDonough was acquitted. Less than three years later, on December 18, 2015, he filed this Section 1983 suit against Smith and others. McDonough's suit is what Section 1983 is all about: He alleges that his constitutional rights were violated because he was subjected to criminal proceedings—and devastating financial, reputational, and emotional consequences—on the basis of fabricated evidence. There is no dispute that New York's three-year statute of limitations applies to his Section 1983 claim. The question presented is whether McDonough's suit, brought less than three years from his ultimate acquittal, is timely.

The answer is yes, for three independent reasons. *First*, this Court should simply adopt the limitations rule applicable to the most analogous common law tort, as it did in *Wallace* v. *Kato*, 549 U.S. 384 (2007).

Here, McDonough challenges the wrongful initiation and maintenance of criminal proceedings on the basis of fabricated evidence; the closest common law analog to his Section 1983 claim is therefore malicious prosecution. *Heck* v. *Humphrey*, 512 U.S. 477, 483-484 (1994). At common law, the statute of limitations on a malicious prosecution claim does not begin to run until criminal proceedings terminate in the defendant's favor. *Id.* at 489. The rationale for that rule at common law is fully applicable to Section 1983 fabrication of evidence suits like McDonough's, and borrowing the limitations rule for malicious prosecution is compatible with the "values and purposes of the constitutional right at issue." *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 921 (2017) ("*Manuel I*"). The Court should therefore apply that limitations rule here. Because McDonough filed suit within three years of his acquittal, his suit is timely. Borrowing the limitations rule from the most analogous tort, moreover, is straightforward: There would be no need for the Court to determine the elements of the Section 1983 claim or otherwise analyze the cause of action.

Second, McDonough's claim is timely under the so-called "standard" federal rule of accrual. Under that rule, the limitations period begins to run when the plaintiff has "a complete and present cause of action" and can actually bring suit. *Bay Area Laundry & Dry Cleaning Pension Tr. Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (internal quotation marks omitted). McDonough was not able to sue until his acquittal for two reasons. First, in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), as well as in *Heck*, this Court made clear that habeas corpus—rather than Section 1983—is the exclusive avenue for a suit

by a criminal defendant challenging the lawfulness of his custody. *See id.* at 500. Because McDonough was in custody for purposes of *Preiser* throughout the criminal proceedings, he could not file this Section 1983 suit prior to his acquittal. His claim accordingly did not accrue until that point. Second, even if *Preiser* did not determine the accrual rule in this case, this Court should adopt favorable termination as an element of McDonough's fabrication of evidence claim, in order to prevent premature Section 1983 suits attacking ongoing criminal proceedings. *See Heck*, 512 U.S. at 483-484. Thus McDonough did not have a complete cause of action until his acquittal. For that reason, too, McDonough's suit was filed within the limitations period.

Third, McDonough's suit is timely for a final, independent reason: Where a plaintiff suffers a continuing violation of her constitutional rights, the statute of limitations does not begin to run until the wrong ends. *See Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380-381 (1982). Here, the constitutional violation McDonough complains of is the initiation and maintenance of criminal proceedings based on fabricated evidence, and the resulting deprivation of his liberty. That constitutional violation did not conclude the first time fabricated evidence was used against McDonough, but instead extended to his acquittal. *See Whelan* v. *Abell*, 953 F.2d 663, 673 (D.C. Cir. 1992) (Silberman, J., joined by Ginsburg, J.). Because McDonough filed suit within three years of the termination of the proceedings against him, his suit is timely under the continuing violation doctrine.

In short, three independent paths for determining the statute of limitations rule all lead to the same result: McDonough's suit is timely. Requiring a criminal defendant to file a civil suit before criminal proceedings terminate will waste judicial resources, impose unnecessary burdens on state officials, and dissuade criminal defendants from bringing meritorious claims. This Court should reverse.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-19a) is reported at 898 F.3d 259. The District Court's opinions (Pet. App. 20a-84a, 85a-135a) are not reported, but are available at 2016 WL 5717263 and 2016 WL 7496128. The Second Circuit's order denying rehearing en banc (Pet. App. 136a-137a) is not reported.

JURISDICTION

The Second Circuit entered judgment on August 3, 2018. Petitioner filed a timely petition for rehearing en banc, which was denied on September 12, 2018. This Court granted certiorari on January 11, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

The Sixth Amendment, U.S. Const. amend. VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Section 1983 of Title 42 of the U.S. Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * .

STATEMENT

A. Factual Background

In 2009, an investigation uncovered fraud in a primary election in Troy, New York. Pet. App. 24a-28a. Several dozen applications for absentee ballots, as well as the absentee ballots themselves, had been forged. *Id.* At the time, McDonough was the Democratic Commissioner of the Rensselaer County Board of Elections. *Id.* at 24a.[1]

Investigators identified a number of suspects, including John Brown, a Democratic member of the city council; Kevin McGrath, a Democratic Party candidate; and William McInerney, the Troy City Clerk. *Id.* at 24a, 27a. McInerney had worked on the incumbent district attorney's election campaign. *Id.* at 28a. To avoid the appearance of impropriety, the district attorney asked a court to appoint a special prosecutor "for all purposes, including investigation, prosecution and disposition" of the election fraud matter. JA286-287. Smith was appointed as "Special District Attorney for all purposes in this matter up to and including the disposition of this case." JA288-289. Once appointed, Smith became "actively engaged in the investigation." Pet. App. 29a; JA96-97, ¶ 326. New York State police officer John Ogden assisted Smith in the investigation. JA96-97, ¶¶ 323, 330.

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[1] The facts are drawn from McDonough's complaint and the opinions below. On a motion to dismiss, the Court must "accept as true all the factual allegations in his complaint." *Manuel I*, 137 S. Ct. at 915 & n.1.

Smith's investigation was beyond biased. Although multiple witnesses implicated Brown, McGrath, and McInerney in the forgery scheme, Smith declined to prosecute them. *See* Pet. App. 100a; JA44, ¶ 11. He instead focused his attention on McDonough. Smith leaked to the press that McDonough was the primary target of the investigation—even though Smith lacked probable cause to prosecute McDonough for the forgery. Pet. App. 29a, 105a. Smith then interviewed McDonough repeatedly, urging him to plead guilty. *Id.* at 32a-35a. On one occasion, Smith expressed animosity toward McDonough's father, the local Democratic Party Chair, who had "turned his back" on Smith's ambitions to run for district attorney. *Id.* at 34a (internal quotation marks omitted).

When it became clear that McDonough would not plead guilty, Smith fabricated evidence implicating McDonough in the forgery. In March 2010, six months before the grand jury was empaneled, Smith and Ogden assisted McGrath in drafting a sworn statement that "falsely incriminated" McDonough. JA146-147, ¶¶ 615-620; JA150-151, ¶¶ 632-635; *see* Pet. App. 34a; JA291; JA296-299. Smith and Ogden also interfered with DNA testing that falsely tied McDonough to three envelopes containing forged absentee ballots. *See* JA97, ¶¶ 327-329; JA162-163, ¶¶ 692-703 (Smith directed laboratory to use his "new" method for DNA extraction after test results under established protocols were negative); *see also* Pet. App. 104a.

In September 2010, Smith commenced grand jury proceedings against McDonough. Pet. App. 34a. Smith sought McDonough's indictment on 38 counts of felony forgery and 36 counts of felony criminal

possession of a forged instrument. *Id.* at 36a. To support those charges, Smith submitted affidavits from witnesses whose ballots or ballot applications had been forged. *See id.* at 55a. Two of those affidavits were fabricated by Smith. *See id.* at 36a-37a, 55a, 99a.[2] Both witnesses testified at one of McDonough's subsequent trials that the signatures on their affidavits had been forged. *Id.* at 37a; *see also* JA181-183, ¶¶ 813-830, JA266-267. One witness also testified that he had never seen the affidavit before, and the other testified that she did not remember having seen it. *See id.* As the trial court stated on the record, "the first witness out of the box says there's a forged instrument that the People presented." JA182, ¶ 822 (emphasis omitted); *see also* JA266-267.

Before the grand jury, Smith submitted the DNA evidence falsely linking McDonough to the forged absentee ballots. Pet. App. 35a. Ogden, meanwhile, testified that he had reviewed the handwriting on the forged absentee ballot applications and concluded that it belonged to the same person. *Id.* Ogden later admitted at trial that his grand jury testimony "was not correct and a mistake." *Id.* at 35a-36a (internal quotation marks omitted).

Kevin O'Malley initially testified before the grand jury that he had been involved in the forgery, without implicating McDonough. *Id.* at 36a. Smith

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[2] Jolene VanVranken's affidavit was submitted to the grand jury. *See* JA264-267, 305. The parties disputed in state court whether Jermaine Joseph's affidavit was also submitted to the grand jury. *See* JA305.

called O'Malley at home following his testimony and instructed him to change his story. *Id.* at 99a; JA176-177, ¶¶ 784-787. O'Malley then returned to the grand jury and testified, falsely, that McDonough had told him to complete certain absentee ballot applications. JA176, ¶ 783. Consistent with his false written statement, McGrath also implicated McDonough before the grand jury. *See* JA42, ¶ 10(t); JA171, ¶ 748. The grand jury indicted McDonough on the felony counts. JA180, ¶¶ 809-810.

Following his indictment, McDonough unsuccessfully moved to disqualify Smith as special prosecutor. Pet. App. 37a. McDonough also contacted the U.S. Attorney's office and requested an FBI investigation into his prosecution. *Id.* at 38a. The FBI assigned an agent to investigate McDonough's complaint, as well as the election fraud. JA201, ¶ 930. The agent gathered sufficient evidence to implicate McInerney in the ballot forgery scheme. Pet. App. 38a. The agent also found that Smith had not told the truth when he informed police that McInerney and Brown could not be prosecuted due to insufficient evidence. *Id.* Following the FBI investigation, state police arrested McInerney on forgery charges. *Id.* at 39a; JA211, ¶ 993. Smith, however, offered McInerney a cooperation agreement, and he pled guilty to one felony count and was sentenced to a 90-day work order. Pet. App. 39a. In exchange for his cooperation, Brown similarly pled guilty to one felony count. *Id.*

Smith's fabrications continued in the months leading up to trial. As part of his pre-trial investigation, he directed McInerney to prepare a written statement falsely implicating McDonough. *Id.* at 65a-67a.

In that statement, McInerney wrote that he was certain McDonough had forged absentee ballots. *Id.* at 65a-66a; *see also* JA280-281, JA284. McInerney's statement served as the basis upon which other witnesses fabricated their testimony. Pet. App. 66a-67a; *see also* JA214, ¶ 1009. At Smith's urging, Brown similarly prepared a written statement falsely implicating McDonough. *See* JA223, ¶¶ 1061-63.

Smith ultimately tried McDonough twice. The first trial ended in a mistrial, and the second trial resulted in acquittal. Pet. App. 5a-6a. At each trial, several witnesses—many of whom had been given cooperation agreements by Smith—falsely testified against McDonough. *Id.* at 40a. McGrath, Brown, O'Malley, McInerney, and Ogden gave the same fabricated testimony that they had provided when the case was under investigation. *See id.*; JA229, ¶¶ 1094-95; JA234, ¶ 1125. Their testimony related in part to the DNA evidence falsely incriminating McDonough. *See* JA164, ¶ 707; JA215, ¶ 1016. Other witnesses also falsely testified against McDonough at each trial. Pet. App. 40a; JA229, ¶ 1094. The testimony of one witness, Anthony Renna, was so patently fabricated that it was stricken in its entirety at McDonough's second trial, and the judge instructed Renna to immediately leave the courthouse. Pet. App. 40a; JA234-235, ¶¶ 1121-26.

McDonough's first trial lasted from January 17 to March 13, 2012, and ended in a mistrial. *See* Pet. App. 5a-6a. McDonough's second trial took place between November 13 and December 21, 2012. *Id.* at

6a.[3] At the end of his second trial, the jury acquitted McDonough. *Id.* at 6a, 41a.

B. Procedural History

McDonough was acquitted on December 21, 2012. *Id.* He filed this Section 1983 suit in the U.S. District Court for the Northern District of New York on December 18, 2015. *Id.* at 23a. The suit raised two claims. First, McDonough alleged that Smith (acting in concert with others, including Ogden and McInerney) violated his constitutional rights by fabricating evidence. *Id.* at 47a. McDonough claimed that his rights were violated under the Fourth, Fifth, Sixth, and Fourteenth Amendments. *See id.* at 49a; *see also* JA252-253, ¶¶ 1209-1213. Second, McDonough alleged that Smith and others were liable under Section 1983 for malicious prosecution. Pet. App. 47a; JA253-254, ¶¶ 1214-18.[4]

The district court held that McDonough suffered a liberty deprivation when he was required to appear at two separate trials and comply with other restrictions imposed by New York law. *See* Pet. App. 57a. The court nevertheless dismissed as untimely

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[3] The date of McDonough's acquittal is in the record. *See* Pet. App. 41a. The other trial dates are not in the record.

[4] Under Second Circuit precedent, malicious prosecution is an independent constitutional violation cognizable under Section 1983. *See, e.g.*, *Garnett* v. *Undercover Officer C0039*, 838 F.3d 265, 278 (2d Cir. 2016). Some Justices have expressed skepticism about whether malicious prosecution itself violates the Constitution. *See Manuel I*, 137 S. Ct. at 925-926 (Alito, J., dissenting); *Cordova* v. *City of Albuquerque*, 816 F.3d 645, 661-666 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment). That question is not presented here.

McDonough's Section 1983 claim based on fabrication of evidence. *Id.* at 48a-53a; *see id.* at 94a. According to the district court, the statute of limitations on that claim began to run when McDonough learned, or should have learned, of the fabricated evidence, which the district court concluded occurred before McDonough's acquittal. *Id.* at 52a-53a. The district court permitted McDonough's malicious prosecution conspiracy claim to proceed against McInerney, citing the written statement in which McInerney fabricated evidence at Smith's direction that implicated McDonough. *Id.* at 64a-69a. The court also permitted McDonough's conspiracy claim to proceed against Ogden. *See id.* at 122a-123a. The district court entered judgment with respect to Smith under Federal Rule of Civil Procedure 54(b), and certified the dismissal of McDonough's claims against Smith for appeal. *Id.* at 4a. McDonough's claims against other parties, including McInerney and Ogden, remain pending today in the district court.

The Second Circuit affirmed. It "acknowledge[d]" that in other circuits a "fabrication cause of action accrues only after criminal proceedings have terminated." *Id.* at 12a.[5] The court nevertheless "disagree[d] with those decisions." *Id.* at 13a. According

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[5] *See Floyd* v. *Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018) (per curiam); *Castellano* v. *Fragozo*, 352 F.3d 939, 959-960 (5th Cir. 2003) (en banc); *Mills* v. *Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (citing *King* v. *Harwood*, 852 F.3d 568, 579 (6th Cir. 2017)); *Bradford* v. *Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015); *Mondragón* v. *Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008).

to the Second Circuit, "[b]ecause the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted," the statute of limitations begins to run "when he becomes aware of [the] tainted evidence and its improper use" and "his liberty has been deprived in some way." *Id.* at 10a, 13a. The court acknowledged that "there is no dispute in this case that McDonough suffered a liberty deprivation." *Id.* at 10a. It concluded, however, that McDonough learned of the fabricated evidence "at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial, after all of the prosecution's evidence had been presented." *Id.* at 13a-14a. The Second Circuit accordingly affirmed the district court's dismissal of McDonough's fabrication of evidence claim as untimely. *Id.* at 19a.[6]

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. To determine when the statute of limitations began to run on McDonough's Section 1983 claim, this Court should adopt the limitations rule governing the most analogous common law tort. *Wallace*, 549 U.S. at 388. McDonough alleges that he was wrongfully indicted and forced to endure two trials on the basis of evidence fabricated by a state official. JA252, ¶ 1211. The "gravamen" of his claim is the

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[6] The Second Circuit also affirmed the dismissal of McDonough's malicious prosecution claim against Smith. *See* Pet. App. 17a-19a.

"wrongfulness" of the criminal proceedings against him, and malicious prosecution is therefore the most analogous common law tort. *Heck*, 512 U.S. at 486 n.5; *see also Fitzjohn* v. *Mackinder* (1861) 142 Eng. Rep. 199, 9 C.B. (N.S.) 505 (upholding malicious prosecution claim based on fabricated evidence). In addition, McDonough seeks damages for the period *after* the institution of legal process; his Section 1983 claim is akin to malicious prosecution for that reason as well. *See Wallace*, 549 U.S. at 389-390.

At common law, the statute of limitations for the tort of malicious prosecution did not begin to run until criminal proceedings terminated in the defendant's favor. *See Heck*, 512 U.S. at 489-490; *see also Findley* v. *Bullock*, 1 Blackf. 467, 468 (Ind. 1818). In *Wallace*, the Court adopted wholesale the statute of limitations rule from the most analogous tort at common law. *See* 549 U.S. at 388-390. The Court should do the same here: The fundamental purposes underlying the limitations rule for malicious prosecution—avoiding parallel litigation and protecting criminal proceedings from collateral attack—apply with equal measure to a Section 1983 suit predicated on fabrication of evidence. *See Carpenter* v. *Nutter*, 59 P. 301, 302 (Cal. 1899). Applying that limitations rule in this case, the statute of limitations for McDonough's fabrication of evidence claim did not begin to run until the termination of the proceedings against him, rendering his suit timely.

II. McDonough's Section 1983 suit is also timely under the "standard" federal limitations rule. According to that rule, the limitations period begins "when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry*, 522 U.S. at 201

(quoting *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941)). A plaintiff does not have a complete and present cause of action until each element of his claim has been established and he can "actually sue." *Green* v. *Brennan*, 136 S. Ct. 1769, 1778 (2016). Here, McDonough could not actually sue Smith until his acquittal, for two separate reasons.

First, under *Preiser*, a person in state custody—which includes a criminal defendant released on personal recognizance—may challenge the criminal proceedings against him only through habeas corpus. *See* 411 U.S. at 500; *see also Justices of Bos. Mun. Court* v. *Lydon*, 466 U.S. 294, 300-301 (1984); *Manuel* v. *City of Joilet*, 903 F.3d 667, 670 (7th Cir. 2018) ("*Manuel II*"). *Heck* makes clear that the same principles apply to damages suits. *See* 512 U.S. at 481-483. McDonough thus could not have maintained his Section 1983 suit until his release from custody, which occurred at acquittal. His fabrication claim therefore did not accrue until that point. *See Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 106 (2013) (statutes of limitations generally "commence when the plaintiff is *permitted to file suit*" (emphasis added)).

Second, this Court should adopt favorable termination as an element of McDonough's Section 1983 claim, rendering his suit timely. The Court has "found tort analogies compelling in establishing the elements of a cause of action." *Wilson* v. *Garcia*, 471 U.S. 261, 277 (1985). In *Heck*, the Court borrowed an element of the most analogous tort at common law—there, the element of favorable termination from the tort of malicious prosecution—because the purposes served by the common law element were

applicable to the Section 1983 claim at issue. In particular, the favorable termination requirement avoided parallel litigation and collateral attacks on criminal proceedings. *See* 512 U.S. at 483-486. Those same considerations should govern the accrual rule in this case. If the Court reaches the issue, it should hold that favorable termination is an element of McDonough's Section 1983 claim, and that his claim did not accrue until acquittal for that reason as well.

III. McDonough's suit is also timely under the continuing violation doctrine. It is black-letter law that where a plaintiff complains of a "continuing violation" rather than a "discrete act," the statute of limitations does not begin to run until the violation ends. *Havens Realty*, 455 U.S. at 380-381 (internal quotation marks omitted). This doctrine has deep roots in the common law and has been accepted in a wide variety of settings. *See, e.g.*, *DePaola* v. *Clarke*, 884 F.3d 481, 487 (4th Cir. 2018) (deliberate indifference to medical needs); *Manuel II*, 903 F.3d at 670 (unlawful pretrial detention); *Shackelford* v. *Staton*, 23 S.E. 101 (N.C. 1895) (improper indexing of judgment).

A legal proceeding "is a continuous, not an isolated event, because its effects persist from the initial filing to the final disposition of the case." *Whelan*, 953 F.2d at 673. When a lawsuit is itself wrongful, the "ongoing prosecution" of the lawsuit is a "continuing tort." *Id.* For this reason, the wrongful initiation and maintenance of criminal proceedings on the basis of fabricated evidence is a continuing violation that does not end until criminal proceedings terminate. *See id.* Because the violation of McDonough's

constitutional rights persisted through his acquittal, the statute of limitations did not begin to run until that point.

IV. Starting the limitations clock at favorable termination serves policy objectives critical to our Constitution and laws. Fabrication of evidence remains a "disturbingly common cause of wrongful convictions." Cert.-Stage Amicus Br. of Criminal Defense Organizations et al. 4. In an area of frequent litigation where the constitutional stakes are high, a clear rule is needed. Favorable termination is a bright-line rule for defendants, public officials, and courts. The Second Circuit's contrary approach—which starts the limitations period depending on the vagaries of when the defendant knew (or even worse, "should have known") that fabricated evidence was used against him—will sow uncertainty for criminal defendants and public officials alike.

Further, because the statute of limitations is a scant one or two years for Section 1983 suits in many states, a contrary rule will force criminal defendants to file a Section 1983 suit while criminal proceedings are still ongoing. Many criminal defendants will decline to do so, particularly if the civil suit would reveal the criminal defendant's trial strategy or create a risk of impeachment. As a result, egregious acts of misconduct will go unpunished. Other criminal defendants will press ahead and sue, requiring public officials—at a minimum—to move for a stay of civil litigation while criminal proceedings are ongoing, and risking burdensome discovery on both sides.

A rule that obliges "conscientious defense attorneys" to file unripe suits adds to the burdens imposed on criminal defendants, public officials, and

courts, "with no clear advantage to any." *Panetti* v. *Quarterman*, 551 U.S. 930, 943 (2007). This Court should reject the Second Circuit's rule and hold that the statute of limitations for McDonough's fabrication of evidence claim did not begin to run until favorable termination.

ARGUMENT

I. THE STATUTE OF LIMITATIONS FOR MCDONOUGH'S SECTION 1983 FABRICATION CLAIM DID NOT BEGIN TO RUN UNTIL FAVORABLE TERMINATION UNDER THIS COURT'S "ANALOGOUS TORT" ANALYSIS.

In its decision below, the Second Circuit held that the "standard" rule for accrual determined when the statute of limitations began to run for McDonough's Section 1983 claim based on fabrication of evidence. Pet. App. 13a. Under that rule, accrual occurs—and the statute of limitations begins to run—"when a plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Id.* at 9a-10a (internal quotation marks omitted). As other courts of appeals have held, however, the "standard" rule of accrual does not always govern the statute of limitations for a Section 1983 claim based on fabrication of evidence. *See, e.g.*, *Bradford* v. *Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015). Instead, under this Court's decision in *Wallace*, the proper approach is to adopt the limitations rule from the most analogous common law tort, and to apply it to McDonough's Section 1983 claim. *See* 549 U.S. at 388-390. The Court thus does not need to delve into what the elements of McDonough's constitutional claim are.

The common law tort of malicious prosecution is the most analogous tort to McDonough's fabrication of evidence claim, and it is governed by a distinctive rule: The statute of limitations does not begin to run until favorable termination. *See Heck*, 512 U.S. at 489. That rule reflects a longstanding principle in Anglo-American courts: that a limitations rule should not encourage civil suits to collaterally attack ongoing criminal proceedings. *See Carpenter*, 59 P. at 302. That principle applies fully to a Section 1983 suit like McDonough's, which seeks to remedy the initiation and continuation of criminal proceedings on the basis of fabricated evidence. This Court should accordingly hold that under *Wallace*, the statute of limitations for McDonough's fabrication of evidence claim did not begin to run until favorable termination.

A. The Analogous Tort At Common Law Provides The Proper Limitations Rule.

In the aftermath of the Civil War, Congress passed the Civil Rights Act of 1871, which created a cause of action against state officials for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Pub. L. No. 42-22, 17 Stat. 13 (codified at 42 U.S.C. § 1983); *see Monroe* v. *Pape*, 365 U.S. 167, 171 (1961). Section 1983 "creates a species of tort liability" for the violation of constitutional rights. *Heck*, 512 U.S. at 483.

Although Section 1983 is a federal cause of action to enforce federal law, in "several respects" it "looks to the law of the State in which the cause of action arose." *Wallace*, 549 U.S. at 387; *see* 42 U.S.C. § 1988(a). One of those respects is the *length* of the

statute of limitations governing a Section 1983 claim. *See Wallace*, 549 U.S. at 387; *see generally Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 157-165 (1987) (Scalia, J., concurring in judgment) (recounting history of borrowing state limitations periods). In particular, this Court has determined that "a State's personal injury statute of limitations should be applied to all § 1983 claims." *Owens* v. *Okure*, 488 U.S. 235, 240-241 (1989). McDonough's suit is accordingly governed by New York's three-year limitations period for personal injury torts. *See* N.Y. C.P.L.R. § 214(5); Pet. App. 9a.

The question of *when* the statute of limitations begins to run, however, "is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 388. Instead, that question is "governed by federal rules conforming in general to common-law tort principles." *Id.* The "standard" rule in the federal context is that a limitations period "commences when the plaintiff has a complete and present cause of action." *Bay Area Laundry*, 522 U.S. at 201 (internal quotation marks omitted). That occurs when all of the elements of the plaintiff's claim have been satisfied, and the plaintiff can "actually sue." *Green*, 136 S. Ct. at 1778. But the standard rule does not always govern. This Court has "recognized that statutes of limitations do not inexorably commence upon accrual." *Heimeshoff*, 571 U.S. 99, 106 (2013).

A cause of action may "accrue[] at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit." *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993); *see also Wallace*, 549 U.S. at 390 n.3. In other words, even if the elements of a claim have

been satisfied and the plaintiff can bring suit, the statute of limitations may not begin to run. One area where the Court has not always followed the "standard" limitations rule is Section 1983 suits.

In *Wallace*, this Court held that the statute of limitations for a Section 1983 claim based on unlawful arrest did *not* begin to run when the claim accrued, but instead at a later point dictated by common law principles. There, the criminal defendant sought damages under Section 1983 for his unlawful arrest. *See* 549 U.S. at 387. The Court held that the criminal defendant's cause of action accrued—and that he could have brought suit—"as soon as the allegedly wrongful arrest occurred, subjecting him to the harm of involuntary detention." *Id.* at 388. The statute of limitations for the criminal defendant's Section 1983 claim, however, did *not* begin to run at the moment of arrest. Instead, this Court looked to "the common law's distinctive treatment of the torts of false arrest and false imprisonment," which "provide the closest analogy to claims of the type" under consideration. *Id.* (brackets omitted).

Under the common law rule, the limitations period "begin[s] to run against an action for false imprisonment when the alleged false imprisonment ends." *Id.* at 389 (quoting 2 H. G. Wood, A Treatise on the Limitation of Actions at Law and in Equity § 187d(4), at 878 (rev. 4th ed. 1916), and citing A. Underhill, Principles of Law of Torts 202 (1881)). The Court held that the common law's "distinctive" rule—and not the "standard" rule of accrual—applied to an analogous Section 1983 claim for unlawful imprisonment. *Id.* The Court thus concluded that "to determine the beginning of the limitations period in

this case, we must determine when [the] false imprisonment came to an end." *Id.*

Wallace does not require the Court, in all instances, to import the limitations rule of the common law analog. The common law "serv[es] 'more as a source of inspired examples than of prefabricated components.'" *Manuel I*, 137 S. Ct. at 921. Sometimes, of course, a court *should* "adopt wholesale" the limitations rule "that would apply in a suit involving the most analogous tort," as this Court did in *Wallace*. *Id.* at 920. But in all cases "courts must closely attend to the values and purposes of the constitutional right at issue." *Id.* at 921.

B. The Most Analogous Tort At Common Law Is Malicious Prosecution.

To determine the limitations rule applicable to a claim under Section 1983, then, this Court "look[s] first to the common law of torts." *Id.* at 920. The initial step in that analysis is to identify the most closely analogous tort at common law. *See Wallace*, 549 U.S. at 388-389.

Here, McDonough alleges that his constitutional rights were violated because criminal proceedings were initiated and maintained against him on the basis of fabricated evidence. *See* Pet. 27; *see also* JA252-253, ¶¶ 1209-1213. As McDonough explained in his complaint, he has a "Constitutional right not to be deprived of his liberty, liberty interests or a fair trial as a result of the fabrication of false evidence by a government officer acting in an investigatory capacity." JA252, ¶ 1211. McDonough alleges that he suffered injury from the time of his indictment until his acquittal almost three years later, including during 16 "weeks of two protracted trials that ended

on December 21, 2012." JA250, ¶ 1203; *see also* JA249-251, ¶¶ 1198-1208.

The closest common law analog to the constitutional violation suffered by McDonough is malicious prosecution. That tort makes liable a person who wrongfully "initiates" or "continu[es] * * * criminal proceedings." Restatement (Second) of Torts §§ 653, 655 (1977). The "gravamen" of malicious prosecution is "the wrongfulness of the prosecution." *Heck*, 512 U.S. at 486 n.5; *see also* W. Page Keeton et al., Prosser and Keeton on Torts § 119, at 870 (5th ed. 1984) (stating that the "emphasis" in a malicious prosecution case is on "the misuse of criminal * * * actions as a means for causing harm"). That is the "gravamen" of McDonough's claim here—the "wrongfulness" of a prosecution predicated on fabricated evidence. *Heck*, 512 U.S. at 486 n.5; *see Wallace*, 549 U.S. at 390 (malicious prosecution seeks to remedy the "wrongful institution of legal process" and the "wrongful use of judicial process" (emphasis omitted)). Because McDonough is vindicating his constitutional right to "be free from criminal charges based on a claim of deliberately fabricated evidence," his claim "is similar to the tort of malicious prosecution." *Bradford*, 803 F.3d at 388 (internal quotation marks and alterations omitted).[7]

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[7] McDonough raised both malicious prosecution and fabrication of evidence claims in this suit. The district court dismissed McDonough's malicious prosecution claim against Smith on absolute immunity grounds. Pet. App. at 109a-110a. The district court noted that a different immunity analysis would apply to McDonough's fabrication of evidence claim, but did not reach the question. *Id.* at 112a-114a. "[A]bsolute immunity does not extend" to an action "against a prosecutor for conduct

Certain fabrication of evidence claims may be analogous to other common law torts. If a plaintiff brought a Section 1983 suit seeking damages exclusively for the violation of his constitutional rights *prior* to the institution of legal process, then the tort of false arrest or false imprisonment might "provide[] the proper analogy." *Wallace*, 549 U.S. at 389. That is because "[t]he sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*." *Id.* at 389-390 (emphasis in original); *see* Keeton et al., *supra*, § 119, at 885-886 ("If there is no process issued at all and the plaintiff is arrested without a warrant or any other valid basis for an arrest, there is no malicious prosecution but a false arrest.").

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taken in an investigatory capacity." *Hartman* v. *Moore*, 547 U.S. 250, 262 n.8 (2006). In the Second Circuit, a prosecutor can be liable if he "fabricate[s] evidence in his investigative role" and it was "at least reasonably foreseeable that in his advocacy role he would later use that evidence." *Zahrey* v. *Coffey*, 221 F.3d 342, 346-347, 353-354 (2d Cir. 2000); *see Michaels* v. *McGrath*, 531 U.S. 1118 (2001) (Thomas, J., dissenting from denial of certiorari) (agreeing with Second Circuit's approach to absolute immunity). Other circuits agree. *See Fields* v. *Wharrie*, 740 F.3d 1107, 1111-14 (7th Cir. 2014); *Beltran* v. *Santa Clara Cty.*, 514 F.3d 906, 908 (9th Cir. 2008) (en banc) (per curiam); *Prince* v. *Hicks*, 198 F.3d 607, 611-614 (6th Cir. 1999). No question of absolute immunity is before the Court in this case. It is not fairly included in the question presented, and it was not raised by the Brief in Opposition. *See* Sup. Ct. R. 14(1)(a); 15(2). And neither the district court nor the Second Circuit considered whether Smith would enjoy absolute immunity with respect to McDonough's fabrication claim. Any question of absolute immunity is properly left for remand. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

If a plaintiff brought a Section 1983 suit alleging the wrongful use of legal process for some purpose *outside* the process itself—say, to extort money from the victim—then the tort of abuse of process might provide the proper analogy. As this Court has explained, the "gravamen of that tort" is the "extortionate perversion of lawfully initiated process to illegitimate ends." *Heck*, 512 U.S. at 486 n.5; *see* Martin L. Newell, A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process, ch. I, § 7, at 7-8 (1892); *Grainger* v. *Hill* (1838) 132 Eng. Rep. 769, 4 Bing. (N. C.) 212 (use of legal process to extort ship's register).[8]

The focus of McDonough's claim, by contrast, is the criminal process itself. And McDonough seeks relief only for the violation of his constitutional rights *after* the institution of legal process—specifically the initiation and maintenance of criminal proceedings. As this Court has made clear, his claim is thus analogous to the common law tort of malicious prosecution. *See Wallace*, 549 U.S. at 390; *Heck*, 512 U.S. at 483-484; *Mondragón* v. *Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008) ("After the institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim."); *Bradford*, 803 F.3d at 388; *see also* Keeton et. al., *supra*, § 119,

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[8] Because the tort is focused on an injury *outside* the process itself, favorable termination is generally not a requirement. *See Mayer* v. *Walter*, 64 Pa. 283, 285-286 (1870) (citing *Grainger*); *see also* Keeton et. al., *supra*, § 121, at 897-898 ("[I]f the defendant prosecutes an innocent plaintiff for a crime without reasonable grounds to believe him guilty, it is malicious prosecution; if he prosecutes him with such grounds to extort payment of a debt, it is abuse of process." (footnote omitted)).

at 885-886 ("So long as the plaintiff has been detained by legal process, it cannot be said that he has been falsely imprisoned and the claim, if there is one, must be for malicious prosecution * * * ." (footnote omitted)).

Common law treatises and cases confirm that malicious prosecution is the most analogous tort—indeed, they have even described fabrication of evidence as one possible basis for a malicious prosecution suit. Sir Frederick Pollock's treatise *The Law of Torts*, for example, makes clear that in an action for malicious prosecution, it "is no excuse for the defendant that he instituted the prosecution under the order of a Court, if the Court was moved by the defendant's *false evidence* * * * and if the proceedings in the prosecution involved the repetition of the *same falsehood*." Sir Frederick Pollock, The Law of Torts 289 (4th ed. 1895) (emphases added). Otherwise, "the defendant would be allowed to take advantage of his own fraud upon the Court which ordered the prosecution." *Id.*; *see also* 4 William Blackstone, Commentaries *41-42 (In malicious prosecution action, the "vice of lying" is "taken notice of by our law," permitting "private recompence.").

Common law courts, moreover, have upheld malicious prosecution actions on facts involving fabricated evidence that are analogous to those here. In *Fitzjohn*, the plaintiff alleged that the defendant had procured the plaintiff's prosecution based on a falsified document. 142 Eng. Rep. at 199-200. The court held that the plaintiff's suit against the defendant for "maliciously * * * causing him to be prosecuted" was "maintainable," because the prosecution was "the result of the wrongful and malicious act." *Id.*; *see*

also id. at 204 (Blackburn, J., dissenting) (describing how "defendant had knowingly given false testimony before the county-court judge, with a view to make him believe that a forged receipt of the plaintiff was his genuine signature"); *see also* Pollock, *supra*, at 289 (citing *Fitzjohn*); *Coxe* v. *Smithe* (1662) 83 Eng. Rep. 327, 1 Lev. 119 (where plaintiff alleged that the defendant made a "false affidavit" against him, plaintiff had action for "malicious procurement" because "it was falsely and maliciously done").

Courts in this country have reached similar conclusions. To take one example, in *Schenck* v. *Butsch*, 32 Ind. 338 (1869), the Indiana Supreme Court upheld a conviction for malicious prosecution where the defendant had falsely accused the plaintiff of forgery before a grand jury, leading to the plaintiff's trial and acquittal. *See id.* at 339-341. In *Everett* v. *Henderson*, 14 N.E. 932 (Mass. 1888), the Massachusetts Supreme Court similarly stated that "maliciously making a false affidavit" supports "an action on the case for a malicious prosecution." *Id.* at 936.

In short, under this Court's precedent, common law cases and treatises, and early decisions of U.S. courts, McDonough's fabrication of evidence claim—which is grounded on the wrongful initiation and maintenance of criminal proceedings on the basis of fabricated evidence—is analogous to the common law tort of malicious prosecution.

C. The Statute Of Limitations For Malicious Prosecution Governs McDonough's Section 1983 Fabrication Claim.

The tort of malicious prosecution follows a "distinctive" limitations rule. *Wallace*, 549 U.S. at 388. As this Court has recognized, the statute of limitations

for the tort of malicious prosecution does not begin to run until favorable termination. *See Heck*, 512 U.S. at 489-490. That conclusion is supported by common law treatises. *See* Martin L. Newell, A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process, ch. IX, § 1, at 327 (1892); 2 H. G. Wood, A Treatise on the Limitation of Actions at Law and in Equity § 187d(4), at 878 (rev. 4th ed. 1916) ("Limitations begin to run * * * against an action for malicious prosecution when the prosecution is ended or abandoned."). It is also supported by early decisions of American courts. *See e.g.*, *Printup Bros. & Co.* v. *Smith*, 74 Ga. 157, 162 (Ga. 1885); *Lowe* v. *Wartman*, 1 A. 489, 489-490 (N.J. 1885); *Findley*, 1 Blackf. at 468.

The Court should apply the "distinctive" limitations rule that governs the common law tort of malicious prosecution to McDonough's Section 1983 claim. The purpose of that rule in the common law context is to regulate the relationship between criminal and civil proceedings involving the same underlying issues. In particular, the rule that the statute of limitations for malicious prosecution does not begin to run until favorable termination discourages "parallel litigation" and "conflicting resolutions" in two different proceedings. *Heck*, 512 U.S. at 484 (internal quotation marks omitted). As the California Supreme Court explained in 1899, the favorable termination rule "has always prevailed both in England and in this country" for that simple reason: "Proceedings in courts having jurisdiction of the person and of the subject-matter must be shielded from collateral attack." *Carpenter*, 59 P. at 302; *see also* Dan B. Dobbs et al., The Law of Torts § 590 (2d ed. 2018 update).

As in *Wallace*—where the Court adopted the "distinctive" common law limitations rule—the Court should hold that the statute of limitations for McDonough's Section 1983 claim based on fabrication of evidence did not begin to run until favorable termination. McDonough's claim is analogous to the common law tort of malicious prosecution because it challenges the initiation and maintenance of criminal proceedings and seeks damages for the period *after* the institution of legal process. *See supra* pp. 23-28. Fabrication claims of this sort create the same risk of parallel litigation—and the same potential for collateral attack on pending criminal proceedings—as a suit for malicious prosecution at common law. And the common law limitations rule is perfectly consistent with the "values and purposes of the constitutional right at issue," *Manuel I*, 137 S. Ct. at 921, while serving the practical concerns attending a suit to vindicate that right, *see infra* pp. 50-58. The Court should therefore adopt that limitations rule.

At common law, the statute of limitations for a malicious prosecution claim does not begin to run until favorable termination. *See Heck*, 512 U.S. at 489-490. McDonough was acquitted on December 21, 2012, and he filed this Section 1983 suit on December 18, 2015. Because McDonough filed suit within three years of the favorable termination of the criminal proceedings against him, his Section 1983 claim based on fabrication of evidence is timely, and the Second Circuit erred in dismissing it.

II. MCDONOUGH'S CLAIM IS ALSO TIMELY UNDER THE "STANDARD" RULE FOR ACCRUAL.

The Court should follow the "analogous tort" framework from *Wallace* laid out above, *supra* Part I. Under that framework, the Court can simply borrow the statute of limitations from the most analogous tort, without determining the elements of McDonough's fabrication of evidence claim.

If the Court applies the "standard" rule for accrual, however, the outcome is the same, for two reasons. First, a claim does not accrue until the plaintiff can actually maintain suit. *See Green*, 136 S. Ct. at 1777; *Bay Area Laundry*, 522 U.S. at 201. Under *Preiser* and *Heck*, McDonough was barred from bringing his Section 1983 claim prior to the termination of the criminal proceedings against him because he was in custody for habeas purposes. *See Heck*, 512 U.S. at 481-483; *Preiser*, 411 U.S. at 500. His claim accordingly did not accrue until those proceedings concluded. Second, the Court should adopt favorable termination as an element of McDonough's Section 1983 fabrication of evidence claim. Because that element was not satisfied until McDonough's acquittal, he did not have a complete cause of action until that point. His suit is timely for that reason as well.

A. Because *Preiser* And *Heck* Foreclose Section 1983 Suits Before Favorable Termination, Such Suits Do Not Accrue Until That Point.

There is a straightforward reason the Second Circuit erred by concluding that, under the "standard" rule, McDonough's fabrication of evidence claim accrued prior to favorable termination. As this Court has made clear, the statute of limitations does not "commence" until a "plaintiff is permitted to file suit." *Heimeshoff*, 571 U.S. at 106. That is because "[s]tarting the limitations clock ticking before a plaintiff can *actually* sue * * * serves little purpose." *Green*, 136 S. Ct. at 1778 (emphasis altered). Under *Preiser* and *Heck*, McDonough was unable to "actually sue" Smith for initiating and maintaining criminal proceedings against him prior to the termination of those proceedings. The statute of limitations for McDonough's Section 1983 claim thus did not begin to run until his acquittal.

The rule of *Preiser* is that when a person in state custody wishes to challenge the fact or duration of that custody, his "sole federal remedy is a writ of habeas corpus." 411 U.S. at 500. The Court has interpreted the meaning of "custody" broadly for purposes of *Preiser* to include defendants who, like McDonough prior to his acquittal, have been released on personal recognizance. *See Lydon*, 466 U.S. at 300-301; *Hensley* v. *Mun. Court, San Jose Milpitas Judicial Dist.*, 411 U.S. 345, 353 (1973).[9]

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[9] A criminal defendant in custody may be required to exhaust state remedies before obtaining habeas relief from a federal

Preiser would thus foreclose a pre-termination Section 1983 suit by a criminal defendant in McDonough's position challenging the initiation and maintenance of the proceedings against him. In such a case, the criminal defendant would be in pre-trial detention or released on personal recognizance subject to certain restrictions on his liberty; either way, the criminal defendant is in "custody" for purposes of *Preiser*. *Lydon*, 466 U.S. at 300-301; *Preiser*, 411 U.S. at 486 (habeas corpus is "the specific instrument to obtain release" for a petitioner "imprisoned prior to trial" (citing *Ex parte Royall*, 117 U.S. 241 (1886)). And a Section 1983 suit alleging that, because a state official fabricated evidence, there should be no criminal proceeding *at all*, would "necessarily" constitute a challenge to the lawfulness of the criminal defendant's custody. *See Heck*, 512 U.S. at 481-482, 487. It would thus be barred by *Preiser*. *See Gerstein* v. *Pugh*, 420 U.S. 103, 107 n.6 (1975) (noting that, under *Preiser*, "habeas" would be the "exclusive remedy" for a person in pre-trial custody seeking "release"); *Manuel II*, 903 F.3d at 670. As a result of *Preiser*, then, a Section 1983 plaintiff in custody cannot "actually sue" in federal court to challenge the initiation and maintenance of the proceedings against him until those proceedings are

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court. *See Lydon*, 466 U.S. at 301; *Hensley*, 411 U.S. at 353. The fact that habeas may be unavailable prior to exhaustion does not open the door to a Section 1983 suit. *See Preiser*, 411 U.S. at 489-490 ("Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.").

over. *Green*, 136 S. Ct. at 1778. His Section 1983 claim thus does not accrue for limitations purposes until that time.

Indeed, this was the basic logic of the delayed accrual rule in *Heck*. That case lay "at the intersection" of Section 1983 and "the federal habeas corpus statute." 512 U.S. at 480. *Preiser* had "held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement." *Heck*, 512 U.S. at 481. *Heck* extended *Preiser* to a suit seeking monetary damages under Section 1983, where awarding damages would "call into question the lawfulness of conviction *or confinement*." *Id.* at 481, 483 (emphasis added). Under *Preiser*, the *Heck* Court held that such actions do not accrue "until the conviction or sentence has been invalidated." *Id.* at 490. While the civil plaintiff in *Heck* was a convicted prisoner, *Heck*'s rationale is not limited to that circumstance. Where a plaintiff suing under Section 1983 is in custody for purposes of the habeas statute, and challenges the lawfulness of that custody, the plaintiff's claim does not accrue until favorable termination. *See id.* at 489; *see also Lewis* v. *City of Chicago*, 914 F.3d 472, 478 (7th Cir. 2019).[10]

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[10] The Court did not analyze *Preiser*'s effect on the accrual of the claim in *Wallace*. At the time the suit was filed, the plaintiff was not in custody. *See Wallace*, 549 U.S. at 387. In *Wallace*, moreover, the plaintiff claimed that he had been arrested without probable cause *prior* to legal process. *Id.* at 389. While he was in detention without legal process, the statute of limitations did not begin to run. *Id.* at 389-390. After he was detained pursuant to legal process, a Section 1983 suit challenging the unlawful *initial* arrest presumably would

In this case, McDonough was in custody for purposes of *Preiser* until his acquittal. *See* Pet. App. 10a, 57a; *see also* JA180-181, ¶ 812. While in custody, McDonough's only avenue for challenging the initiation and maintenance of criminal proceedings against him on the basis of fabricated evidence was habeas corpus. *See Heck*, 512 U.S. at 482-483. Under the "standard" rule for accrual, McDonough thus could not maintain his Section 1983 suit against Smith until McDonough's acquittal. *See Green*, 136 S. Ct. at 1777-78. His Section 1983 claim based on fabrication of evidence accordingly did not accrue until favorable termination. For that reason, McDonough's Section 1983 suit is timely.

B. This Court Should Adopt Favorable Termination As An Element Of McDonough's Section 1983 Claim.

1. McDonough's suit is timely under the "standard" rule for yet another reason. Under that rule, a claim does not accrue until each of its elements has been satisfied. *See Green*, 136 S. Ct. at 1777-78. This Court should adopt favorable termination as an element of McDonough's Section 1983 suit, and conclude that the limitations clock did not begin to run until his acquittal.

The common law "provide[s] the appropriate starting point" for considering the elements of a Section 1983 claim. *Carey* v. *Piphus*, 435 U.S. 247, 258

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not have implicated the lawfulness of his subsequent custody. Thus *Preiser* would not necessarily have barred the Section 1983 suit in *Wallace* at any point after the statute of limitations began to run.

(1978); *see Manuel I*, 137 S. Ct. at 920. Where the "interests protected by a particular branch of the common law * * * parallel closely" the interests implicated by a particular Section 1983 claim, *Carey*, 435 U.S. at 258, the rules developed over the centuries at common law may serve "as a source of inspired examples" for a court defining the contours of the Section 1983 claim. *Hartman*, 547 U.S. at 258. That does not mean, of course, that the Court should woodenly transplant common law rules into the Section 1983 context. "In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel I*, 137 S. Ct. at 921.

The Court's decision in *Heck* exemplifies this analysis. There, a state prisoner had brought a Section 1983 suit alleging an "unlawful, unreasonable, and arbitrary investigation" leading to his arrest, the knowing destruction of exculpatory evidence, and the use of "an illegal and unlawful voice identification procedure" at trial. 512 U.S. at 479 (internal quotation marks omitted). The Court determined that the prisoner's suit could not proceed because, if successful, it would "necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. The prisoner was instead required to demonstrate that his conviction was "reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus" prior to filing a Section 1983 suit. *Id.* at 489.

In reaching that conclusion, the Court analogized the Section 1983 claim at issue to the tort of malicious prosecution. *Id.* at 484. In particular, it focused on that tort's favorable termination require-

ment, which embodies the "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 486. As discussed above, the favorable termination requirement "avoids parallel litigation" and serves "the strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Id.* at 484 (internal quotation marks omitted). It also prevents a "collateral attack" on a criminal proceeding through a civil suit. *Id.* at 485; *Carpenter*, 59 P. at 302. The "malicious-prosecution tort's favorable-termination requirement," moreover, is "helpful * * * in suggesting a relatively simple way to avoid collisions at the intersection of habeas and § 1983." *Heck*, 512 U.S. at 498 (Souter, J., concurring). For all of those reasons, the Court adopted favorable termination as an element of the Section 1983 claim at issue in *Heck*.

Those same considerations should lead the Court to adopt favorable termination as an element of McDonough's Section 1983 claim. The core of his claim is that Smith wrongfully initiated and maintained criminal proceedings against him on the basis of fabricated evidence. To allow such a claim to go forward prior to the termination of criminal proceedings would encourage (and in some cases require) parallel litigation in state and federal court. *See id.* at 484; *see infra* pp. 53-58. Termination must be *favorable*, moreover, for the simple reason that if McDonough had been convicted, his claim would have been barred by *Heck*.[11]

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[11] This is not to say, of course, that the Court should adopt *all* the elements of malicious prosecution. *See Manuel I*, 137 S. Ct.

McDonough has indisputably shown favorable termination: He was acquitted. As a result, he did not have a complete cause of action until that point, and his Section 1983 suit is timely under the "standard" rule. In the vast majority of cases, applying the favorable termination requirement will likewise be simple. A court need only ask whether the criminal defendant was acquitted, or whether his conviction was "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 487. If so, his Section 1983 claim may proceed.[12]

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at 921. "The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Carey*, 435 U.S. at 258. In order to answer the question presented in this case—which concerns only accrual—the Court need not determine what the other elements of McDonough's Section 1983 claim would be on the merits, because there is no dispute that favorable termination was the latest point at which McDonough's claim could have accrued.

[12] As this Court has held, the elements of a Section 1983 claim (such as favorable termination) should be "tailored to the interests protected by the particular right" in question. *Carey*, 435 U.S. at 259. So, for instance, courts have permitted Section 1983 suits to proceed where a conviction is overturned, even if criminal proceedings continue. *See, e.g.*, *Jackson* v. *Barnes*, 749 F.3d 755, 760-761 (9th Cir. 2014) (permitting Section 1983 suit where first conviction was overturned due to a constitutional violation, even though the defendant was subsequently reconvicted). In circumstances where a convicted defendant had *no* opportunity to challenge her conviction through habeas proceedings—because, say, she was sentenced to a fine or time

2. Adopting favorable termination as an element of McDonough's claim, moreover, is consistent with "the values and purposes of the constitutional right at issue." *Manuel I*, 137 S. Ct. at 921. There is no question that criminal defendants have a constitutional right not to be deprived of liberty based on evidence fabricated by the government. *See, e.g.*, *United States* v. *Agurs*, 427 U.S. 97, 103 (1976) (The "Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair * * * ."); *Briscoe* v. *LaHue*, 460 U.S. 325, 326 n.1 (1983) ("[K]nowing use of perjured testimony violates due process * * * ."); *Miller*, 386 U.S. at 7 (The "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."); *Napue*, 360 U.S. at 269 ("The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, [is] implicit in any concept of ordered liberty * * * ."); *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942) ("[P]erjured testimony, knowingly used by the State authorities to obtain [a] conviction" works "a deprivation of rights guaranteed by the Federal Constitution."); *Mooney*, 294 U.S. at 112 (due process is not satisfied "if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of

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served—requiring favorable termination may not be appropriate. *See Spencer* v. *Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., joined by O'Connor, Ginsburg, and Breyer, JJ., concurring); *id.* at 25 n.8 (Stevens, J., dissenting). The Court does not need to determine in this case how or whether to apply favorable termination in all contexts.

court and jury by the presentation of testimony known to be perjured"); *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 100 (1st Cir. 2013) (It is "self-evident" that "those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." (internal quotation marks omitted)); *Zahrey* v. *Coffey*, 221 F.3d 342, 355 (2d Cir. 2000) ("It is firmly established that a constitutional right exists not to be deprived of liberty on the basis of false evidence fabricated by a government officer.").

There is similarly no question that being indicted and criminally tried is a serious deprivation of liberty. Many criminal defendants are imprisoned while their criminal cases are pending. *See, e.g.*, *Gerstein*, 420 U.S. at 114. Others, like McDonough, are arrested and then released on personal recognizance subject to restrictions on their freedom. *See* Pet. App. 10a, 57a. Either way, arrest and prosecution are "public act[s] that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States* v. *Marion*, 404 U.S. 307, 320 (1971); *see Gerstein*, 420 U.S. at 114 ("Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty."); *Albright* v. *Oliver*, 510 U.S. 266, 277-278 (1994) (Ginsburg, J., concurring). As the district court held below, the allegations in McDonough's complaint "clearly state that [he] suffered a restraint on his liberty that extended beyond the arraignment itself." Pet. App. 57a. To

impose that restraint on the basis of fabricated evidence is not tolerable under the Constitution.

Though the courts of appeals have uniformly recognized that subjecting a defendant to criminal charges on the basis of fabricated evidence violates the Constitution, they have not been consistent about *which* provision of the Constitution has been violated. Some courts have found that the use of fabricated evidence to deprive a defendant of liberty violates the Due Process Clause. In *Devereaux* v. *Abbey*, 263 F.3d 1070 (9th Cir. 2001) (en banc), for example, the Ninth Circuit held that "there is a clearly established constitutional *due process right* not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Id.* at 1074-75 (emphasis added). This Court has similarly suggested that the use of fabricated evidence is a due process violation. *See Briscoe*, 460 U.S. at 326 n.1; *Miller*, 386 U.S. at 7; *Mooney*, 294 U.S. at 112.

Other courts have regarded a fabrication of evidence claim as a violation of the Fourth Amendment, at least when the claim involves pretrial deprivation of liberty. In *Lewis*, the Seventh Circuit interpreted this Court's opinion in *Manuel I* to hold that "the Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pretrial detention" on the basis of fabricated evidence. 914 F.3d at 475; *see also Manuel I*, 137 S. Ct. at 917-918 ("look[ing] to the Fourth Amendment to analyze" a "pretrial restraint on liberty"); *Hernandez-Cuevas*, 723 F.3d at 100 ("We now further specify that one constitutional source of this 'self-evident' prohibition against manufactured evidence in the pretrial detention context is the

Fourth Amendment's guarantee of freedom from seizure but upon probable cause.").

On this view, a criminal defendant is "seized" by pretrial restraints on liberty. *See Manuel I*, 137 S. Ct. at 917; *Albright*, 510 U.S. at 277-279 (Ginsburg, J., concurring) (at "common law" the "difference between pretrial incarceration and other ways to secure a defendant's court attendance" was "a distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite"). As the Second Circuit has held, "while a state has the undoubted authority, in connection with a criminal proceeding, to restrict a properly accused citizen's constitutional right to travel outside of the state as a condition of his pretrial release, and may order him to make periodic court appearances, such conditions are appropriately viewed as seizures within the meaning of the Fourth Amendment." *Murphy* v. *Lynn*, 118 F.3d 938, 946 (2d Cir. 1997); *see also Gallo* v. *City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998). And if the seizure occurs on the basis of fabricated evidence, it does not comport with the Fourth Amendment.

This Court need not decide in this case whether a Section 1983 claim based on fabrication of evidence should be textually housed within the Fourth Amendment or the Due Process Clause (or even within the Sixth Amendment).[13] Indeed, it may be

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[13] The Second Circuit has suggested that fabrication of evidence claims could arise under the Sixth Amendment, which guarantees a fair trial before an impartial jury. *See Morse* v. *Fusto*, 804 F. 3d 538, 547 n.7 (2d Cir. 2015); *see also Duncan* v. *Louisiana*, 391 U.S. 145, 155-158 (1968); *Nebraska Press Ass'n*

that *all* of those provisions are violated: "Certain wrongs" can "implicate more than one of the Constitution's commands." *Soldal* v. *Cook Cty.*, 506 U.S. 56, 70 (1992); *see, e.g.*, *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 50 (1993) ("[S]eizure of property implicates two explicit textual source[s] of constitutional protection, the Fourth Amendment and the Fifth." (second alteration in original; internal quotation marks omitted)). It is common ground that to initiate and maintain criminal proceedings against a defendant on the basis of fabricated evidence violates the Constitution, and the distinction between the Fourth Amendment, Sixth Amendment, and Due Process Clause does not impact the specific question presented in this case.

That is because the reasons for delaying the start of the limitations period until favorable termination would be exactly the same. And, whatever the precise textual source of McDonough's Section 1983 claim, delaying accrual until favorable termination is consistent with the values and purposes of the constitutional right at issue. This Court has specifically "recognized that the limitations period should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Green*, 136 S. Ct. at 1778 (internal quotation marks and brackets omitted). To hold that a criminal defendant's claim accrues at a time when he *cannot* bring suit because he remains in custody

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v. *Stuart*, 427 U.S. 539, 551 (1976) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors * * *." (internal quotation marks omitted)).

would undermine the basic constitutional right against the fabrication of evidence by government actors in criminal proceedings. *See infra* pp. 53-58 & n.15. Such an accrual rule could even operate to bar Section 1983 relief entirely, if a claim was foreclosed by *Preiser* and *Heck* throughout the entire limitations period. That is a particular danger in the many states with one or two-year limitations periods, which may expire before the criminal defendant is released from custody.

As explained below, moreover, even if a criminal defendant *could* bring a Section 1983 suit during the pendency of criminal proceedings, many would choose not to do so to avoid prejudicing their criminal defense or undercutting their Fifth Amendment privilege against self-incrimination. *See SEC* v. *Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980) (en banc); *see also infra* at pp. 55-57. A limitations rule that dissuades plaintiffs from vindicating the constitutional right at issue would not serve "the values and purposes" of that right. *Manuel I*, 137 S. Ct. at 921. For all of these reasons, if the Court reaches the issue, it should conclude that favorable termination is an element of McDonough's fabrication of evidence claim.

III. BECAUSE MCDONOUGH HAS ALLEGED A CONTINUING VIOLATION, THE STATUTE OF LIMITATIONS BEGAN TO RUN AT FAVORABLE TERMINATION.

McDonough's suit is also timely under the continuing violation doctrine. That doctrine holds that where the plaintiff complains of a "continuing violation" rather than a "discrete act," the statute of limitations does not begin to run until the violation

ends. *Havens Realty*, 455 U.S. at 380-381 (internal quotation marks omitted); *see also Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 115 (2002); *Heard* v. *Sheahan*, 253 F.3d 316, 319 (7th Cir. 2001) (continuing violation doctrine is "a doctrine governing accrual"). The constitutional violation in this case was being subject to criminal proceedings on the basis of fabricated evidence, and the resulting loss of liberty. *See supra* pp. 23-24. Because that constitutional violation was continuing rather than discrete, the statute of limitations did not begin to run until criminal proceedings terminated in McDonough's favor.

Courts have long recognized that the "cause of action for a continuing tort * * * accrues afresh from day to day." *Hamilton* v. *Manhattan Ry. Co.*, 9 N.Y.S. 313, 315 (Super. Ct. 1890); *see also Drews* v. *Williams*, 23 So. 897, 899-900 (La. 1898). To take one example, the North Carolina Supreme Court held in *Shackelford* that where the clerk of court failed to index a judgment, the tort "was a continuous one, beginning from the day on which he failed to properly index the judgment * * * and continuing until he ceased to be clerk of the court." 23 S.E. at 102. The statute of limitations thus did not begin to run until the violation ceased. *See id.*

This Court has applied the continuing violation doctrine in Title VII cases alleging a hostile work environment, as well as to claims of racial discrimination. *See, e.g.*, *Morgan*, 536 U.S. at 117; *Havens Realty*, 455 U.S. at 380-381. As this Court explained in *Morgan*, where a claim "involves repeated conduct" that "occurs over a series of days or perhaps years," a claim is timely as long as "an act contrib-

uting to the claim occurs within the filing period." 536 U.S. at 115-117. Federal courts have relied on the continuing violation doctrine in many other contexts. *See, e.g.*, *DePaola*, 884 F.3d at 486 (deliberate indifference to prisoner's medical needs is a "continuing violation" under principles "of federal common law").

In *Manuel I*, this Court declined to reach whether the continuing violation doctrine applied to a Section 1983 claim premised on unlawful pretrial detention, instead leaving that issue for the lower court. 137 S. Ct. at 921-922. On remand, the Seventh Circuit concluded that the doctrine controlled and that the plaintiff's suit was timely. *See Manuel II*, 903 F.3d at 670. As Judge Easterbrook's opinion for the court explained, "[w]hen a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends." *Id.* at 669 (citing *Morgan*, 536 U.S. at 115-121). The court distinguished a "continuing *wrong*" from a "continuing *harm*," noting that "once the wrong ends, the claim accrues even if that wrong has caused a lingering injury." *Id.* Because detention without probable cause is a continuing wrong—and not simply a continuing harm—the court concluded that the statute of limitations began to run when the detention ended. *Id.* at 670.

The wrongful initiation and maintenance of criminal proceedings on the basis of fabricated evidence—leading to the ongoing deprivation of liberty and constitutional rights—is a continuing violation. A legal proceeding "is a continuous, not an isolated event, because its effects persist from the initial filing to the final disposition of the case." *Whelan*, 953 F.2d at 673; *see Wilkinson* v. *Goodfellow-Brooks*

Shoe Co., 141 F. 218, 220-221 (C.C.E.D. Mo. 1905) ("[T]he institution of the proceedings and the subsequent appeal, if wrongfully done, constitute but one continuous tort * * * ."). "It is repetitive in that it represents the assertion, every day," of the claims against the defendant. *Whelan*, 953 F.2d at 673. "A lawsuit is thus different from the typical case of a mere failure to right a wrong and make the plaintiff whole." *Loumiet* v. *United States*, 828 F.3d 935, 948 (D.C. Cir. 2016) (internal quotation marks omitted).

Unlike a "single" wrongful act, "the commencement of a lawsuit is only the first link in a chain of conduct that does not end until the complaining party ceases prosecution of the suit." *Whelan*, 953 F.2d at 674; *see also Foss* v. *Whitehouse*, 48 A. 109, 112 (Me. 1901) (describing wrongful prosecution as a "continuous tort, though composed of numerous links"). Here, Smith's fabrications led to criminal charges—and two criminal trials—against McDonough. Being subject to criminal proceedings on the basis of fabricated evidence was an ongoing deprivation of McDonough's liberty and constitutional rights. *See supra* pp. 40-41. The constitutional violation thus continued throughout those proceedings, ending only when McDonough was acquitted. And the statute of limitations for McDonough's Section 1983 claim began to run at favorable termination, not at the initiation of the proceedings or at some point in-between. *See Manuel II*, 903 F.3d at 670; *see also Albright*, 510 U.S. at 277-280 (Ginsburg, J., concurring) (Because a criminal defendant "remain[s] effectively 'seized' for trial so long as the prosecution against him remain[s] pending," the "time to file the § 1983 action should begin to run not at the start,

but at the end of the episode in suit, *i.e.*, upon dismissal of the criminal charges.").

This case, of course, is even stronger than one in which a prosecutor fabricates evidence at the outset of an investigation and then relies upon it at various stages of the pre-trial and trial proceedings. After all, Smith did not just fabricate evidence at a single point. He instead fabricated multiple pieces of evidence—from McGrath's fabricated statement prior to the convening of the grand jury, to the forged witness affidavits at the grand jury, to McInerney's fabricated statement prior to the first trial. *See supra* pp. 7-11. Multiple witnesses, moreover, falsely testified at both trials at Smith's urging. *See id.* And these fabrications were intimately linked to one another—McGrath's statement was an integral part of McDonough's indictment, and McInerney's statement was the basis for later fabrications at trial. *See* Pet. App. 66a-67a ("Plaintiff clearly alleged that Defendant McInerney's written statement served as a basis upon which the other witnesses fabricated their testimony * * * ."); *see also* JA153, ¶ 646 (Smith relied on McGrath's statement "to initiate the prosecution based on his false accusations"); JA151, ¶ 636 ("Brown and O'Malley later gave fabricated testimony consistent with McGrath's false accusation and that could not have happened unless they all acted in conspiracy * * * ."); JA178, ¶ 794 ("O'Malley's false testimony was given to be consistent with the false testimony of McGrath and Ogden and the prosecution theory * * * ."). In such circumstances, at a minimum, a continuing violation exists.

In its decision below, the Second Circuit rejected the continuing violation doctrine, and instead held

that the statute of limitations began to run as soon as McDonough became *aware* that fabricated evidence had been used against him. *See* Pet. App. 17a. Smith's violation of McDonough's constitutional rights, however, did not end the first time McDonough became aware of the fabrication. Indeed, it "cannot be said to" have occurred "on any particular day." *Morgan*, 536 U.S. at 115. The constitutional violation continued throughout the criminal proceedings. The continuous pendency of the wrongful criminal case itself deprived McDonough of liberty and imposed substantial emotional and financial burdens. Further, Smith continued to rely on fabricated evidence—and indeed continued to fabricate *new* evidence—against McDonough throughout the proceedings. The fact that McDonough may have been aware at certain points during the criminal process that the evidence against him was fabricated does not change the nature of the constitutional violation he suffered. If anything, it made his injury more acute. Requiring a defendant to endure a criminal prosecution and stand trial twice on the basis of fabricated evidence is a continuing constitutional wrong, regardless of when the defendant gains knowledge of the fabrication.

Even if the Second Circuit were correct, moreover, that the constitutional injury in this case was the *use* of fabricated evidence to deprive McDonough of liberty, *see* Pet. App. 13a, Smith's wrongful use of fabricated evidence—and McDonough's liberty deprivation—continued throughout the criminal proceedings. Smith investigated, indicted, and then tried McDonough twice on the basis of evidence Smith (and others) had fabricated. *See, e.g.*, JA45,

¶ 14; JA131, ¶ 526; JA229, ¶ 1094; JA250, ¶ 1200. That fabricated evidence was presented to two juries, which were duty-bound to "consider and weigh" it during deliberations. *Valencia* v. *Brown*, No. 08-cv-298, 2010 WL 8358087, at *3 (S.D.N.Y. Oct. 25, 2010) (quoting New York pattern jury instructions). Indeed, McDonough's first trial ended in a mistrial, and he was tried *again* on the basis of fabricated evidence. *See, e.g.*, JA234, ¶ 1125. His second jury was similarly bound to consider the fabricated evidence against McDonough, ultimately acquitting him. Throughout this period, McDonough suffered a liberty deprivation. To hold that McDonough's constitutional rights were violated only the *first* time fabricated evidence was used against him—but not the second, or the third—is to ignore the sustained violation of McDonough's rights in this case.

The initiation and maintenance of criminal proceedings on the basis of fabricated evidence is not "a cinematographic series of distinct" wrongs. *United States* v. *Kissel*, 218 U.S. 601, 607 (1910) (Holmes, J.). It is a continuing constitutional violation that persists until those proceedings terminate. The statute of limitations does not begin to run until the violation ends, which in this case occurred when McDonough was acquitted. McDonough filed suit within three years of his acquittal, making his suit timely.

IV. PRACTICAL AND POLICY CONCERNS STRONGLY MILITATE IN FAVOR OF STARTING THE LIMITATIONS PERIOD AT FAVORABLE TERMINATION.

The approach adopted by the Second Circuit is legally wrong. It is also bad policy. There is no

question that the Constitution protects criminal defendants from the willful fabrication of evidence by public officials. *See Mooney*, 294 U.S. at 112. In order to vindicate their constitutional rights, however, criminal defendants need to know when to file suit. Public officials similarly need to understand the scope of their liability, and courts need a clear rule to determine when a suit is timely. Favorable termination is a bright-line rule that is easy to calculate. The Second Circuit's contrary rule is difficult to administer, raises the specter of parallel litigation in the state and federal courts, and requires criminal defendants in many cases to sue the very officials who are pressing charges against them. For these reasons as well, the Court should hold that the statute of limitations for McDonough's Section 1983 claim based on fabrication of evidence began to run at favorable termination.

1. Although the Court has said that the fabrication of evidence is a practice that the Constitution "cannot tolerate," *Miller*, 386 U.S. at 7, fabrication remains a "disturbingly common cause of wrongful convictions." Cert.-Stage Amicus Br. of Criminal Defense Organizations et al. 4.[14] Section 1983 suits provide a federal avenue for holding those who violate the rights of criminal defendants accountable.

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[14] Such claims are prevalent in the courts of appeals. *See, e.g.*, *Garnett*, 838 F.3d at 279; *Black* v. *Montgomery Cty.*, 835 F.3d 358, 370 (3d Cir. 2016); *Webb* v. *United States*, 789 F.3d 647, 667-670 (6th Cir. 2015); *Avery* v. *City of Milwaukee*, 847 F.3d 433, 441-443 (7th Cir. 2017); *Riddle* v. *Riepe*, 866 F.3d 943, 947-948 (8th Cir. 2017); *Caldwell* v. *City & Cty. of San Francisco*, 889 F.3d 1105, 1108-09 (9th Cir. 2018).

See Manuel I, 137 S. Ct. at 916; *see also City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) ("[T]he deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983."). That is particularly important here, where Smith's actions cannot be characterized as an oversight or a mistake. Smith deliberately fabricated evidence, including witness affidavits, used in criminal proceedings against McDonough.

In an area of frequent litigation where the constitutional stakes are high, a clear limitations rule is needed. As Justice Scalia wrote, "any period of limitation is utterly meaningless without specification of the event that starts it running." *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 199 (1997) (Scalia, J., concurring in part and concurring in the judgment). Under the Second Circuit's rule, however, it is anyone's guess as to when the statute of limitations begins to run in a particular case. The exact point at which the criminal defendant knew, or should have known, that fabricated evidence was being used against him is a question of fact that could be litigated for *years* before a court reaches the merits of a Section 1983 claim. And it provides criminal defendants (and their attorneys) little guidance on when to file suit.

Nor will the Second Circuit's rule benefit public officials, who will be unable to calculate with certainty when their Section 1983 liability draws to a close. *See Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 14 (2014) (limitations periods "embody a policy of repose, designed to protect defendants" and foster certainty about a defendant's liability (internal quotation

marks omitted)); *see also Missouri* v. *McNeely*, 569 U.S. 141, 166 (2013) (Roberts, C.J., concurring in part and dissenting in part) (advocating in favor of straightforward rules to guide public officials). Protracted litigation over whether a criminal defendant in fact knew about a fabrication—or instead merely guessed that the evidence was fabricated—is of no service to public officials, either.

Without clear guidance, courts will similarly struggle to determine the boundaries of the limitations period. Under the Second Circuit's approach, judges will be forced to engage in a fact-intensive inquiry to determine when the statute of limitations began to run in each case. *Cf. Novella* v. *Westchester Cty.*, 661 F.3d 128, 148 (2d Cir. 2011) (remanding for a "fact-dependent inquiry into" when each plaintiff knew or should have known of the fact triggering the statute of limitations). "[S]carce judicial resources" are better spent elsewhere. *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009); *see also Grupo Dataflux* v. *Atlas Glob. Grp., L.P.*, 541 U.S. 567, 582 (2004) (rejecting approach that requires "collateral litigation" as "wasteful").

2. Apart from its lack of clarity, the Second Circuit's limitations rule has a more fundamental problem: It encourages premature litigation, while creating a risk of parallel state and federal proceedings.[16] In many states, the statute of limitations for

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[16] Of course, if this Court agrees that *Preiser* would bar suits like McDonough's prior to favorable termination, *see supra* pp. 32-35, and that the statute of limitations begins to run at that point, this particular policy concern would largely be obviated. If, however, the Court were both to adopt the Second Circuit's

filing a Section 1983 claim is very short. Kentucky, Louisiana, and Tennessee, for example, have a one-year statute of limitations for personal injury torts. *See, e.g.*, *Hall* v. *Spencer Cty.*, 583 F.3d 930, 933 (6th Cir. 2009) (Kentucky); *Heath* v. *Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 739 (5th Cir. 2017) (Louisiana); *Mills* v. *Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (Tennessee). Other states have a two-year statute of limitations. *See, e.g.*, *Maldonado* v. *Harris*, 370 F.3d 945, 954 (9th Cir. 2004) (California); *Winfrey* v. *Rogers*, 901 F.3d 483, 492 (5th Cir. 2018) (Texas), *petition for cert. filed*, No. 18-1024 (Jan. 31, 2019); *DePaola*, 884 F.3d at 486 (Virginia).

Many, if not most, criminal proceedings that go to trial last longer than one or two years. In the Bronx, for instance, misdemeanors that reach jury verdicts take nearly 30 months to complete. *See* Cert.-Stage Amicus Br. of Criminal Defense Organizations et al. 19. In Cook County, Illinois, defendants may be held up to *five years* awaiting trial. *See id.* And in McDonough's own case, the time between indictment and acquittal was almost three years. Given the length of criminal proceedings in many jurisdictions, it will be common for a criminal defendant's fabrica-

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accrual rule and hold that *Preiser* bars suits prior to favorable termination, it would give rise to a far graver concern: Some criminal defendants would be barred from bringing a Section 1983 suit until *after* the statute of limitations has expired. Such a result could effectively wipe out a category of meritorious Section 1983 suits alleging serious misconduct by state officials. That possibility is yet another reason that the limitations period should not begin to run until favorable termination.

tion of evidence claim to become time-barred while criminal proceedings are underway.

To preserve a meritorious fabrication claim, some criminal defendants may choose to file a protective Section 1983 suit while criminal proceedings are still ongoing—even if the criminal defendant would have ultimately chosen not to file suit after his acquittal. As this Court stated in *Panetti*, a rule that obliges "conscientious defense attorneys" to file unripe suits adds "to the burden imposed on courts, applicants, and the States, with no clear advantage to any." 551 U.S. at 943; *see also Klein* v. *City of Beverly Hills*, 865 F.3d 1276, 1279 (9th Cir. 2017) (per curiam) (rejecting rule that forces litigants to file unripe Section 1983 suits).

Other criminal defendants will choose not to bring meritorious civil suits in order to avoid prejudice to ongoing criminal proceedings. Those defendants may fear that filing a civil suit will provoke prosecutors to seek greater penalties, or to avoid dropping charges, in the proceedings against them. *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978) (recognizing "the potential for both individual and institutional abuse" created by "the breadth of discretion that our country's legal system vests in prosecuting attorneys"). As this Court stated in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), fear of prosecutorial vindictiveness "may unconstitutionally deter a defendant's exercise" of his constitutional rights. *Id.* at 28 (internal quotation marks omitted). After all, if the criminal defendant is convicted, *Heck* bars a Section 1983 suit for any "harm caused by actions whose unlawfulness would render [the] conviction or sentence invalid." *See* 512 U.S. at 486-487.

Under Rule 8 of the Federal Rules of Civil Procedure, moreover, a plaintiff seeking damages based on fabrication of evidence is required to explain, in detail, why the evidence is fabricated. *See Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). Many lawyers would advise their clients not to make public statements regarding the evidence against them in a criminal proceeding, particularly if they are considering testifying at a criminal trial. "At minimum," Rule 8's pleading standard "requires an innocent accused to assert myriad facts—perhaps unknown to prosecutors—and reveal defense strategies to establish innocence before the criminal trial even begins." Cert.-Stage Amicus Br. of Criminal Defense Organizations et al. 13-14. Indeed, parallel civil and criminal proceedings may "undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits" of the criminal discovery rules, "expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case." *Dresser Indus.*, 628 F.2d at 1376.

Once a civil suit has been filed, public officials at "a minimum" will be required to respond to the criminal defendant's initial filing. Cert.-Stage Amicus Br. of Cause of Action Institute 9. Even if the suit is ultimately stayed or dismissed, officials will expend time and resources seeking that outcome, and then defending it on appeal. *See, e.g.*, *Tribble* v. *Tew*, 653 F. App'x 666, 666-667 (11th Cir. 2016) (per curiam) (litigating issue of stay in the Eleventh Circuit); *see also Boyd* v. *Farrin*, 575 F. App'x 517, 518-521 (5th Cir. 2014) (per curiam) (litigating issue of stay in the Fifth Circuit).

If a Section 1983 suit is *not* stayed, public officials may have to sit for depositions and answer discovery while parallel criminal proceedings are still underway. Unlike criminal cases, civil discovery "requires nearly total mutual disclosure of each party's evidence prior to trial." *Afro-Lecon, Inc.* v. *United States*, 820 F.2d 1198, 1203 (Fed. Cir. 1987); *see also Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 510-511 (1989). Criminal defendants, too, may have to answer questions in a deposition regarding what they know about evidence being used against them at trial—a procedure completely "at odds with the structure and goals of the criminal justice system." Cert.-Stage Amicus Br. of Criminal Defense Organizations 12.

Although many federal courts may choose to stay a Section 1983 suit based on fabrication of evidence while criminal proceedings are ongoing, other courts, including the court of appeals below, have suggested a stay is not mandatory. *See* Pet. App. 16a n.13 ("[T]here may be circumstances where the district court might exercise its discretion to stay the civil action until the criminal case is resolved * * *."). District courts have "broad discretion" to stay or not stay "proceedings as an incident to [their] power to control [their] own docket[s]." *Clinton* v. *Jones*, 520 U.S. 681, 706 (1997). In some courts, civil claims may proceed in parallel with criminal proceedings—precisely what this Court cautioned against in *Heck*. *See Heck*, 512 U.S. at 484; *see, e.g.*, *Boyd*, 575 F. App'x at 520 (permitting litigation of motion to dismiss Section 1983 suit while criminal proceedings are pending); *Scheuerman* v. *City of Huntsville*, 373 F. Supp. 2d 1251, 1257-58 (N.D. Ala. 2005) ("[T]he court finds both plaintiff and the public have a

strong interest in the timely disposition of this civil rights action.").

To encourage premature suits would be in deep tension with the policy embodied in *Younger* v. *Harris*, 401 U.S. 37 (1971). *Younger* "preclude[s] federal intrusion into ongoing state criminal prosecutions." *Sprint Commc'ns, Inc.* v. *Jacobs*, 571 U.S. 69, 78 (2013). Thus, "[w]hen there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution." *Id.* at 72. By its own terms, *Younger* applies only to actions seeking equitable relief, not an action for damages under Section 1983. *See Younger*, 401 U.S. at 43-44. A district court could, of course, stay a Section 1983 suit pending the outcome of criminal proceedings. *See Heck*, 512 U.S. at 487 n.8; *Wallace*, 549 U.S. at 393-394; *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 730 (1996). But that may not always happen, and just the process of filing suit and briefing the stay issue would be a burden on both the criminal defendant and state officials as they gear up for trial. To have a statute of limitations rule that compels criminal defendants to file protective suits is not just impracticable but an affront to federalism.

* * *

Starting the limitations period at favorable termination is a clear rule that benefits criminal defendants, public officials, and courts. It is consonant with this Court's desire to avoid parallel litigation in state and federal courts, *Heck*, 512 U.S. at 484, and it respects the integrity of state criminal proceedings. At common law, courts delayed the start of the limitations period to the end of criminal proceedings to shield those proceedings "from collateral attack."

Carpenter, 59 P. at 302. This Court should apply that rule to McDonough's Section 1983 claim based on fabrication of evidence.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

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No. 18-485

IN THE

Supreme Court of the United States

EDWARD D. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Petitioner's action, brought under 42 U.S.C. § 1983, asserted separate claims for "malicious prosecution" and "fabrication of evidence," both based on allegations that Respondent used fabricated evidence before the grand jury that indicted Petitioner and at Petitioner's trial, which ended in an acquittal. The "malicious prosecution" claim, which required a showing of a lack of probable cause, was dismissed by the district court on the ground that it was barred by absolute immunity. The court of appeals affirmed, and petitioner has not sought review of that ruling.

The courts below held that the "fabrication of evidence" claim, which does not require a showing of a lack of probable cause and therefore could be brought even by an individual who was lawfully indicted and convicted, was time-barred.

The question presented is:

Whether the statute of limitations for a claim for "fabrication of evidence" does not begin to run until the favorable termination of criminal proceedings even though the claim could be brought by an individual who was lawfully indicted and convicted.

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INTRODUCTION

Just two Terms ago, this Court reiterated that "the threshold inquiry in a § 1983 suit ... requires courts to 'identify the specific constitutional right' at issue." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017) (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *see also Cordova v. City of Albuquerque*, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment)). Petitioner resolutely refuses to do that. Instead, the Question Presented refers to "a Section 1983 claim based on fabrication of evidence." Pet. i. Petitioner uses that formulation repeatedly. *See, e.g.*, Br. of Petitioner 3, 4, 15, 16, 19, 20, 28. Petitioner then argues that "[t]he common law tort of malicious prosecution is the most analogous tort to [Petitioner's] fabrication of evidence claim" (Br. of Petitioner 20; *see* Br. of Petitioner 3, 14-15, 23, 27), so the Court should adopt the accrual rule that, Petitioner asserts, applies to malicious prosecution.

The Constitution refers to neither "fabrication of evidence" nor "malicious prosecution." Petitioner appears to believe that it is unnecessary to identify a specific constitutional violation because, in Petitioner's view, whatever the constitutional violation in this case is, the correct "analogy" is to malicious prosecution. *See* Br. of Petitioner 3, 14-15, 20, 23, 27. The federal government takes the same position. *See, e.g.*, Amicus Br. of the U.S. 7-8, 17-20.

But a claim that Petitioner himself denominated a § 1983 claim for "malicious prosecution"—Count II of the complaint filed in the district court (*see* J.A. 253-54)—was dismissed by the district court on the ground that it was barred by absolute immunity. The court of

appeals affirmed the dismissal of that claim, and Petitioner has not sought review of that holding. Petitioner barely acknowledges this fact, and the federal government's argument simply ignores it. Petitioner, and the federal government, are therefore in the position of asserting that Petitioner's remaining claim in this case—a "fabrication of evidence" claim—is "analogous" to a separate claim, with different elements, that Petitioner pled, that was dismissed, and that is not before the Court.

The correct analysis of Petitioner's complaint begins by recognizing that the conduct alleged in the complaint injured Petitioner at two distinct points, implicating two different constitutional rights. *See Manuel*, 137 S. Ct. at 920 n.8 (there is a "constitutional division of labor" between rights applicable pretrial and those applicable at trial). First, according to Petitioner, Respondent obtained the indictment against Petitioner by presenting fabricated evidence to the grand jury. Under *Manuel*, that allegation states a claim under the Fourth Amendment. Second, the complaint alleges that Respondent used fabricated evidence against Petitioner at Petitioner's trial. That allegation asserts a violation of the Due Process Clause.

The Due Process Clause issue at Petitioner's trial is straightforward. Petitioner was acquitted. The state's actions at the trial therefore did not deprive him of liberty. Without a deprivation of liberty, there cannot be a violation of the Due Process Clause. For that reason, it is unclear how Respondent's conduct at trial could have violated Petitioner's rights at all, so the question of an accrual date may not even arise as to that aspect of Petitioner's claim. To be sure, the Court need

not rule out the possibility that government misconduct during a criminal trial may be so outrageous as to constitute a violation of the Due Process Clause—perhaps on a theory of substantive due process—even if the defendant is acquitted. But in such a situation, the claim plainly accrues when the conduct occurs (subject to the requirement that the defendant know or have reason to know of the violation). That is because the outcome of the criminal proceeding is irrelevant to the existence of any constitutional violation. It would, therefore, make no sense to have accrual turn on the date when those proceedings terminate.

Petitioner's allegation that he was wrongfully indicted asserts a claim under the Fourth Amendment, by virtue of this Court's decision in *Manuel*. That claim is made in the count of the complaint in which Petitioner alleged "malicious prosecution." That is, in fact, the entire thrust of Petitioner's brief: that the constitutional violation he is alleging closely resembles malicious prosecution. But the count of Petitioner's complaint alleging "malicious prosecution" was dismissed. The claim that is before the Court—what Petitioner, in his complaint, called a "fabrication of evidence" claim—is a separate claim recognized by the Second Circuit.

The Second Circuit concluded, rightly or wrongly, that a "malicious prosecution" claim accrues upon favorable termination of the proceedings—but is barred here by absolute immunity. And the Second Circuit emphasized, in its opinion below, that what it calls a claim based on fabricated evidence "'is *distinct* from a malicious prosecution claim.'" Pet. App. 15a n.12 (quoting *Bailey v. City of New York*, 79 F. Supp. 3d 424, 446 (E.D.N.Y. 2015)) (emphasis added by the court of

appeals). The distinction is that, according to the Second Circuit's cases, a "fabrication of evidence" claim, unlike a "malicious prosecution" claim, does not require a showing of a lack of probable cause. *See, e.g., Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 129-30 (2d Cir. 1997) (explicitly rejecting, in Section 1983 action, the argument that "as there was probable cause for [the plaintiff's] arrest—independent of the allegedly fabricated evidence—the fabrication of evidence is legally irrelevant"); *Jovanovic v. City of N.Y.*, 486 F.App'x 149, 152 (2d Cir. 2012) (in a Section 1983 action for fabrication of evidence, "[p]robable cause is not a defense.")

Because probable cause is not a defense to a claim for "fabrication of evidence," that claim can be successfully brought by a person who was lawfully indicted—or, for that matter, by a guilty person. For that reason, it again makes no sense to postpone the accrual of that claim (assuming it is a valid claim) until the favorable termination of proceedings. The claim may be valid even if there is no favorable termination.

The reason the courts below did not rule that both the claims against Respondent are barred by absolute immunity—Respondent is, after all, a prosecutor accused of wrongfully initiating a prosecution—is precisely that the Second Circuit draws this distinction between "fabrication of evidence" and "malicious prosecution." The Second Circuit reasons that the "fabrication of evidence" claim pertains to the performance of investigative functions. We have preserved the argument that the "fabrication" claim should also be dismissed on grounds of absolute immunity, and the Court could affirm on that ground.

But in any event, the "fabrication of evidence" claim, which is the only one that is before the Court, is one for which the court of appeals' accrual date—not the date of the termination of criminal proceedings—is plainly appropriate.

STATEMENT

1. In September 2009, during the Working Families Party primary election in Troy, New York, a plot to influence the outcome of that election through the use of forged absentee ballots and ballot applications was uncovered. Those forged applications were submitted to Petitioner, a Rensselaer County election board commissioner responsible for processing such applications, who then approved them. Rensselaer County's elected District Attorney disqualified himself from the investigation and any potential prosecution because several of the alleged conspirators had previously worked on his political campaign, and requested the appointment of a special prosecutor.

A New York state court judge subsequently appointed Respondent as a Special District Attorney to lead that investigation. Following Respondent's investigation, in January 2011 a grand jury indicted Petitioner on thirty-eight counts of felony forgery in the second degree and thirty-six counts of felony criminal possession of a forged instrument in the second degree. Petitioner's first trial ended in a mistrial on March 7, 2012. He was acquitted at his second trial on December 21, 2012.

2. On December 18, 2015, Petitioner filed the instant action under 42 U.S.C. § 1983 alleging that several defendants, including Respondent, had violated his

constitutional rights by fabricating evidence and using it against him before the grand jury and in both his trials. As relevant here, his complaint pleads two claims.[1] Count I, denominated as falling under the Fourth, Fifth, Sixth, and Fourteenth Amendments, asserts a 42 U.S.C. § 1983 claim for his "Constitutional Right Not to be Deprived of Liberty as a Result of Fabrication of Evidence," citing two Second Circuit decisions recognizing such a right. J.A. 251-52 (citing *Zahrey v. Coffey*, 221 F.3d 342, 344 (2d Cir. 2000) and *Ricciuti*, 124 F.3d 123).

Count I alleges that Petitioner was deprived of, *inter alia*,

> (a) the right to be free from unreasonable searches and seizures; (b) the right not to be deprived of liberty without due process of law; (c) the right not to due process of law, both procedural and substantive [sic]; (d) the right to be free from malicious arrest and/or prosecution without probable cause; and (e) the right to a fair trial.

J.A. 252, ¶ 1210. Count II likewise refers to Petitioner's Fourth, Fifth, Sixth, and Fourteenth Amendment rights, but it asserts a § 1983 claim for a "Constitutional Right Not to be Prosecuted Maliciously without Probable Cause," citing a Second Circuit decision recognizing such a right. J.A. 253 (citing *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110 (2d Cir. 1995)). In Count

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[1] The third claim, ostensibly arising under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), was not brought against Respondent and is not before the Court.

II, Petitioner sets out the same list of alleged liberty deprivations that was provided in Count I. J.A. 253 ¶ 1215. In Petitioner's opposition to Respondent's motion to dismiss in the district court, he described his fabrication claim as a "due process and/or fair trial claim," and his malicious prosecution claim as implicating his Fourth Amendment rights only. Pl.'s Opp. MTD 8, 13, ECF No. 108.

Respondent and other defendants filed 12(b)(6) motions to dismiss. The district court dismissed the "malicious prosecution" claim against Respondent on absolute immunity grounds. The court also granted all motions to dismiss Petitioner's "fabrication of evidence" claims as untimely.

3. On appeal, the Second Circuit agreed with the district court's ruling that Petitioner's malicious prosecution claim against Respondent was barred by absolute immunity, observing that "even though [the] complaint suggests that, at times, [Respondent] was acting in an investigatory capacity, 'the distinction between a prosecutor's investigative and prosecutorial functions is immaterial to a malicious prosecution claim, since prosecutors are generally immune from such claims.'" Pet. App 17a-18a.

The Second Circuit rejected Petitioner's argument that his "fabrication of evidence" claim was timely because it was analogous to malicious prosecution, which, the court said, accrues upon favorable termination. The court reasoned that "[t]he constitutional right violated by fabricated evidence" suffered a complete violation, regardless of Respondent's role, "when the fabricated evidence was

used by [Respondent] against [Petitioner.]" *Id.* at 14a-15a.

The court also held that *Heck v. Humphrey*, 512 U.S. 477 (1994), did not delay accrual of Petitioner's § 1983 claim given his acquittal, as *Wallace v. Kato*, 549 U.S. 384 (2007), held that *Heck*'s deferred accrual bar applied only to claims that would necessarily controvert an "outstanding criminal judgment." Pet. App. 16a (quotation marks omitted). Finally, the court rejected Petitioner's argument that his "fabrication" claim constituted a continuing violation lasting until his acquittal, reasoning that use of the allegedly fabricated evidence in the grand jury and at trial were separate wrongful acts, and that "[t]he cause of action accrued when McDonough became aware of the fabricated evidence, which was, at the latest, during the first trial." *Id.* at 17a. It also concluded that the mere continuation of the prosecution did not constitute a continuing violation. *Id.*

SUMMARY OF ARGUMENT

I. Petitioner's § 1983 claim based on allegations of fabrication of evidence is time-barred to the extent it states a claim at all. In the courts below, as well as in this Court, Petitioner has refused to identify the specific constitutional right his § 1983 "fabrication of evidence" claim implicates. But whether one analyzes the claims as Petitioner has set them out, or by reference to any constitutional rights they could implicate, the answer is the same: Petitioner's claim is barred.

A. In the courts below, Petitioner advanced two different § 1983 claims: one predicated on "malicious prosecution," and the other predicated on the

"fabrication of evidence." Under Second Circuit precedent—which Petitioner invoked and embraced—the malicious prosecution version of the § 1983 claim required proof of a deprivation of rights without probable cause and proof of a favorable termination. Conversely, the fabrication of evidence claim did *not* require Petitioner to establish a lack of probable cause or favorable termination. The Second Circuit dismissed the claim premised on malicious prosecution as barred by absolute immunity grounds, and it dismissed the claim based on fabrication of evidence as time-barred.

Assuming the Court accepts the taxonomy of claims that Petitioner and the Second Circuit have presented, it is clear that his "fabrication of evidence" claim is time-barred. The very thing that distinguishes a § 1983 claim premised on fabrication of evidence from one premised on malicious prosecution is that the former is intended to punish the fabrication of evidence *regardless* of whether the government actor had probable cause for his actions—indeed, regardless of whether the defendant was guilty or innocent. And because a "fabrication of evidence" claim does not require favorable termination of the proceedings, it does not require the claimant to wait for that favorable termination for his claim to accrue.

Petitioner would have the Court treat his fabrication of evidence claim as if it were a claim for malicious prosecution, but *that* claim was dismissed on absolute immunity grounds, and Petitioner does not argue for a different result here. If fabrication of evidence presents a distinct basis for bringing a § 1983 claim, then what makes it distinct is that it accrues at the time of the violation, so long as the claimant knew or should have

known of that violation. This Court need go no further to affirm the judgment below.

B. Petitioner's claim based on fabrication of evidence is equally barred if one carries out this Court's directive to assess the viability of a § 1983 claim by first looking to the constitutional right at issue. Here, Petitioner alleges fabrication of evidence at two different stages of his criminal prosecution. The first concerns fabrication of evidence to obtain his indictment. The second involves the use of that allegedly fabricated evidence at trial.

To the extent Petitioner claimed that he was indicted through the use of fabricated evidence *without* probable cause, then that claim would sound in the Fourth Amendment, but that was also the claim that the courts below held was barred by absolute immunity. Petitioner does not challenge that holding here. To the extent Petitioner claimed that the government fabricated evidence where it *had* probable cause to indict, based on untainted evidence, that claim would seemingly allege a violation of substantive due process—a claim that fabrication would still shock the conscience even if the indictment was otherwise validly obtained. But that claim does not, and cannot, turn on the favorable termination of the prosecution; the very point of that claim is that the Constitution is violated regardless of whether the proceeding *ever* terminates in the claimant's favor. As such, that claim should accrue, assuming it is a valid claim, at the time of the violation, provided that the claimant knows or should know of it.

As for Petitioner's claim based on fabrication at trial, the analysis is much the same. Again, any such claim would have to allege that the government violates

substantive due process when it knowingly uses false evidence at trial, even if, as here, the defendant was acquitted. Because that claim is indifferent to the defendant's guilt, there is no basis to wait for a favorable termination for the claim to accrue. A claim based on a violation of substantive due process accrues at the time of the violation, not if or when the claimant subsequently obtains a favorable termination.

II. Petitioner's remaining arguments in support for his special accrual rule are equally erroneous.

A. Although Petitioner contends that this Court's decision in *Heck v. Humphrey* required him to wait for a favorable termination before he could sue, that is plainly incorrect. As this Court subsequently explained in an analogous situation in *Wallace v. Kato*, *Heck*'s rule that a defendant may not pursue a claim that would call his conviction into doubt only applies where there exists an outstanding criminal judgment. Petitioner never had an outstanding criminal judgment because he was never convicted, and thus the *Heck* rule is irrelevant. Petitioner contends that this Court's decision in *Preiser v. Rodriguez* calls for a different result, but that argument fails for three independently sufficient reasons: it is waived; it is foreclosed by this Court's decision in *Wallace*; and it ignores the fact that the only remaining claim in this case is the substantive due process "fabrication" claim that does not require a showing of a lack of probable cause and therefore does not undermine the basis on which Petitioner was in custody.

B. *Wallace* is also the foundation of the answer to Petitioner's argument that his claim was timely under the continuing violation doctrine—that a new claim

freshly accrued every day that he was subject to judicial proceedings based on fabricated evidence. As *Wallace* explained, while a claimant might continue to suffer additional injury during a prolonged deprivation of rights, a claim accrues when a claimant *first* suffers injury, not when the claimant stops suffering injury. Petitioner had all the elements necessary to bring his claim predicated on fabrication of evidence as soon as he was aware of the alleged fabrication. His claim accrued at that time, even if his injuries continued for a longer period. Regardless, there is no contention that the government used fabricated evidence at any time within the limitations period, so the continuing violations doctrine could not help Petitioner even if it applied (which it does not).

C. Petitioner contends that his accrual rule is superior from a policy perspective, but considerations of sound policy cut the other way. The normal rule is that a claim accrues once the elements of the claim have been established and the claimant has notice of the claim. That rule ensures that claims are brought relatively promptly to the time of the violation and fosters all the attendant virtues—avoiding fading memories, providing repose, promoting finality—that statutes of limitations are intended to promote. Conversely, waiting for a favorable termination not only delays the resolution of fabrication claims—claims that, again, having nothing to do with whether a favorable termination is obtained—but provides an unclear starting line for the claim. Most litigation concerning malicious prosecution involves a dispute about whether or when the claimant obtained a favorable determination. There is no need to import that confusing and unnecessary element into a claim premised on fabrication.

Petitioner raises the specter of adverse consequences that will occur if a Section 1983 claim is litigated while the criminal prosecution is ongoing, but that concern is vastly overblown. The Court has anticipated this precise issue and has said that the solution is for trial judges to manage the civil litigation to avoid difficulties. That is what trial courts do in other instances in which there are parallel criminal and civil proceedings.

Nor is favorable termination the right rule for the kind of claim that Petitioner purports to be bringing. The gravamen of that claim is that what the government did was wrong—egregiously wrong—even if the government was entitled to detain the defendant, or even convict him. Grafting a favorable termination requirement on to that kind of claim will prevent deserving claimants from recovering for that specific kind of wrong because they were not able to establish a favorable termination. Petitioner appears content to sacrifice those claimants in order to obtain his ill-fitting accrual rule. This Court should reject that rule and affirm.

ARGUMENT

I. Petitioner's Claims Based On The Alleged Fabrication Of Evidence Are Time-Barred To The Extent They State A Constitutional Violation At All.

Petitioner conspicuously makes no attempt to answer what this Court has described as "[t]he threshold inquiry in a § 1983 suit: [the obligation] to 'identify the specific constitutional right' at issue." *Manuel*, 137 S. Ct. at 920 (citations omitted); *see also*

Cordova, 816 F.3d at 661 (Gorsuch, J., concurring in the judgment) ("If a party wishes to claim a constitutional right, it is incumbent on him to tell us where it lies, not to assume or stipulate with the other side that it must be in there *someplace*."). Section 1983 is not "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more." *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012); *see also Graham v. Connor*, 490 U.S. 386, 394 (1989). It is only "[a]fter pinpointing" the specific right at issue that a court can "determine the ... rules associated with[ ] an action seeking damages for its violation." *Manuel*, 137 S. Ct. at 920.

In fact, Petitioner is asserting two separate constitutional violations, implicating two different constitutional provisions. There is a "constitutional division of labor" between the constitutional analysis appropriate to "'*pretrial* deprivations of liberty,'" *id.* at 920 n.8 (citing *Albright*, 510 U.S. at 274) (emphasis added by the Court in *Manuel*) and the analysis that applies to the criminal trial. *See id.*

First, Petitioner asserts that Respondent wrongfully persuaded a grand jury to indict him without probable cause. That claim asserts a putative violation of the Fourth Amendment. *See Manuel*, 137 S. Ct. at 918. Second, Petitioner asserts that Respondent introduced fabricated evidence at his criminal trials. That claim asserts a right under the Due Process Clause.

Instead of identifying the different constitutional analysis appropriate to different stages of a criminal proceeding, the Petitioner's complaint contained a "fabrication of evidence" count and a "malicious

prosecution" count, both brought under § 1983. The "malicious prosecution" count was dismissed by the district court; the district court's holding was affirmed by the court of appeals; and Petitioner has not sought review. So, with his actual "malicious prosecution" claim foreclosed, Petitioner now repeatedly asserts that "fabrication of evidence" is "analogous" to malicious prosecution.

In fact, both Petitioner and the federal government greatly overstate the significance of analogies to common law causes of action in determining when a § 1983 claim accrues. The Court has repeatedly cautioned that "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Manuel*, 137 S. Ct. at 921 (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)). Whatever the proper role of analogies, though, the notion that a plaintiff who pleads two distinct claims, one of which is dismissed on grounds of absolute immunity, can then change course and insist that the remaining claim was, all along, actually "analogous" to the one that was dismissed—surely that stretches the use of analogies too far, and is another reminder of the importance of "'identify[ing] the specific constitutional right' at issue." *Manuel*, 137 S. Ct. at 920 (citation omitted).

In any event, whether Petitioner's claims are analyzed in the terms in which he pled them or, as they should be, by considering the constitutional principles (if any) that they invoke, the outcome is the same: the judgment of the court of appeals should be affirmed.

A. Even If Claims Of "Malicious Prosecution" And "Fabrication Of Evidence" Are Cognizable Under § 1983, Those Claims Are Barred In This Case.

Petitioner's complaint stated two counts against Respondent. Both counts asserted claims under § 1983. Both listed "the Fourth, Fifth, Sixth and Fourteenth Amendments" as the basis for the claims. *See* J.A. 252, 253. Count I was labeled "Constitutional Right Not to Be Deprived of Liberty as a Result of Fabricated Evidence," and Count II was labeled "Constitutional Right Not to be Prosecuted Maliciously Without Probable Cause." J.A. 251, 253.

The Second Circuit recognizes both a § 1983 claim for "malicious prosecution" and a § 1983 claim for "fabrication of evidence." Under Second Circuit law, those are "*distinct* claims"—a point that the Second Circuit, in this case, went out of its way to emphasize. *See* Pet. App. 15a n.12. And the Second Circuit has identified some critical differences between "malicious prosecution" and "fabrication of evidence." That is why Petitioner himself pled them as separate counts. And it is why the lower courts treated them differently—dismissing Count I, the "fabrication of evidence" claim, because it is time-barred, and Count II, the "malicious prosecution" claim, on grounds of absolute immunity.

Specifically, a § 1983 "malicious prosecution" claim, according to the Second Circuit, requires the plaintiff to show a lack of probable cause to institute a proceeding and a favorable termination of the proceeding. *See, e.g.*, *Mitchell v. City of N.Y.*, 841 F.3d 72, 79 (2d Cir. 2016); *Cameron v. City of N.Y.*, 598 F.3d 50, 63 (2d Cir. 2010); *Ricciuti*, 124 F.3d at 130. The courts below accordingly

ruled that the "malicious prosecution" claim did not accrue until Petitioner was acquitted. But whether that ruling was right or wrong—an issue we address below—the courts below dismissed the "malicious prosecution" claim on grounds of absolute immunity, and Petitioner does not challenge that holding in this Court. The central argument made by both Petitioner and the federal government is that the remaining claim in this case should be treated *as if* it were a common law claim for malicious prosecution. But there *was* such a claim in this case. It was rejected on absolute immunity grounds and Petitioner has not sought to revive it.

Under the Second Circuit's decisions, a "fabrication of evidence" claim, by contrast with a "malicious prosecution" claim, can be brought even if there was probable cause. The Second Circuit has been clear on this point. In *Jovanovic v. City of New York*, 486 F. App'x 149, 152 (2d Cir. 2012), the Second Circuit flatly stated that in a § 1983 action for fabrication of evidence, "[p]robable cause is not a defense." *See also Garnett v. Undercover Officer C0039*, 838 F.3d 265, 278 (2d Cir. 2016) ("[P]robable cause, which is a Fourth Amendment concept, should not be used to immunize a police officer who violates an arrestee's non-Fourth Amendment constitutional rights."). In *Ricciuti v. New York City Transit Authority*, 124 F.3d 123 (2d Cir. 1997), the court—after holding that there was probable cause for an arrest—explicitly rejected, in emphatic terms, the argument that "as there was probable cause for [the] arrest—independent of the allegedly fabricated evidence—the fabrication of evidence is legally irrelevant." *Id.* at 129-30. The court in *Ricciuti* accordingly held that it was error for a district court to grant the defendants' motion for summary judgment on

the "fabrication of evidence" claim, even though there had been probable cause to proceed against the plaintiff.

The Second Circuit's recent decision in *Rentas v. Ruffin*, 816 F.3d 214 (2d Cir. 2016), makes especially clear the significance of the rule that a "fabrication" claim, unlike a "malicious prosecution" claim, can be brought even when there was probable cause to proceed against the plaintiff. The plaintiff in *Rentas* was acquitted after having been detained for three years; like Petitioner, he brought both a "malicious prosecution" and a "fabrication" claim. The Second Circuit ruled that there was a jury question whether probable cause existed on the malicious prosecution claim. *Id.* at 221. But the Second Circuit then held that on the "fabrication" claim, the plaintiff would be entitled to only nominal damages—not compensatory damages for his prolonged detention—if the jury concluded that probable cause did exist. *See id.* at 224.

The Second Circuit, and other courts of appeals that make "fabrication of evidence" actionable even when there is probable cause, seem to take the position that some government conduct is so egregious that it should give rise to a constitutional claim even if that conduct had no effect on the outcome of the proceeding. For example, in *Ricciuti*—the foundational Second Circuit case on this point, which Petitioner cited in the "fabrication" count of his complaint—the court stated:

> No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate

> false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice.

124 F.3d at 130. As we will show below, this claim is best seen as a substantive due process claim—that government conduct that shocks the conscience violates the Due Process Clause for that reason alone. Second Circuit cases do refer to the "fabrication of evidence" claim as a due process claim. *Zahrey v. Coffey*, 221 F.3d 342, 348 (2d Cir. 2000); *Ricciuti*, 124 F.3d at 130.[2]

But whatever the soundness of the Second Circuit's view, a "fabrication of evidence" claim does not, and cannot, require a favorable termination of the proceedings. That is because a valid "fabrication" claim

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[2] Similarly, some of the Second Circuit's opinions addressing the "fabrication of evidence" claim refer to a deprivation of liberty as an element of that claim. *See, e.g.*, Pet. App. 10a; *Zahrey*, 221 F.3d at 349. Because a "fabrication" claim can be brought even when there is probable cause, this cannot refer to the deprivation of liberty attributable to criminal charges being instituted against the § 1983 plaintiff—in a "fabrication" case, any deprivation of liberty resulting from those charges can be supported by probable cause. *See Rentas*, 816 F.3d at 224; *supra* pp. 17-19.

The Second Circuit's reference to "liberty" means simply the "liberty" not to be subjected to proceedings at which fabricated evidence is used, irrespective of whether the use of that evidence affects the outcome of the proceeding. The point of calling a deprivation of liberty an "element" of the claim is that a plaintiff cannot prevail simply by showing, for example, that evidence was fabricated by government officials but never used in any proceeding.

can be brought by an individual against whom the government has probable cause to proceed. Indeed, it can be brought by an individual who is guilty. When, or how, the criminal proceeding is concluded has no bearing on the validity of a "fabrication of evidence" claim.

In other words, there may be no *favorable* termination at all to a case in which the accused has a valid "fabrication" claim. That necessarily follows from the principle that the Second Circuit emphasizes repeatedly: that a "fabrication of evidence" claim—unlike a "malicious prosecution" claim—may be brought by an individual even if the government has enough untainted evidence of that individual's guilt to establish probable cause and obtain a conviction. Under Petitioner's proposed rule, such an individual's claim would never accrue. Obviously that cannot be right.

It therefore makes no sense to use the date that the proceedings end as the accrual date. The claim accrues when the wrong was done—when the government acted in a way that, in the courts' view, requires a constitutional sanction no matter what its consequences. Fabrication of evidence can, of course, be a crime, and the statute of limitations for the criminal offense would begin to run when the act was committed, subject to a notice requirement. The "fabrication" claim that the Second Circuit recognizes is comparable to a criminal offense: it is wrongful conduct in and of itself. The limitations period should operate in the same way.

That is enough to require that the judgment below be affirmed. Taking Petitioner's claims, and the Second Circuit's law, at face value, the claim that supposedly accrues upon a favorable termination is barred by absolute immunity. The only claim that remains is one

that accrued when the wrong was done (subject to the requirement, standard in statute of limitations cases, that the plaintiff know or have reason to know of the wrong). That was the accrual date that the court of appeals specified.

B. When Claims Relating To The Indictment Are Properly Characterized Under The Constitution, They Are Barred, To The Extent They Exist At All.

The outcome is the same when Petitioner's claims are cast, as they ought to have been, in terms of specific constitutional violations.

1. Any Claim That Petitioner Was Indicted Without Probable Cause, Which Would Arise Under The Fourth Amendment, Is Barred By Absolute Immunity.

Under *Manuel v. City of Joliet*, Petitioner's claim that he was indicted without probable cause, on the basis of fabricated evidence, states a claim under the Fourth Amendment. *See Manuel*, 137 S. Ct. at 914. The Court in *Manuel* left open the question when that Fourth Amendment claim accrues. But that accrual issue is not before the Court in this case. The claim that Petitioner was indicted without probable cause was the claim raised in Count II of Petitioner's complaint—the count labeled "malicious prosecution." As we have noted, under the Second Circuit cases that Petitioner invoked, "malicious prosecution" requires a showing of a lack of probable cause—just what a Fourth Amendment claim requires. *See Manuel*, 137 S. Ct. at 913-14. In fact, the claim in *Manuel* itself was presented, by the § 1983 plaintiff in that case, as a "malicious prosecution" claim.

See Pet. for Cert. i, *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) (No. 14-9496), 2015 WL 9855124 quoted at 137 S. Ct. 923 (Alito, J., dissenting). And in holding that the Fourth Amendment was the source of a claim that an individual was wrongly indicted, the Court in *Manuel* relied on the views of five Justices in *Albright*—another case in which the claim resembled one for "malicious prosecution." *See Albright v. Oliver*, 510 U.S. 266, 270 & n.4 (1994) (plurality opinion).

The "malicious prosecution" claim in this case therefore should be viewed as raising a Fourth Amendment issue. And that claim was dismissed on grounds of absolute immunity and is not before this Court. This Court therefore need not—and should not—reach the question of when that claim accrued. Because Petitioner has not challenged the ruling on absolute immunity, the accrual question, as to the Fourth Amendment claim, cannot affect the outcome of this case.

The lower courts concluded that that claim accrued when Petitioner was acquitted. *See* Pet. App. 14a (court of appeals), 94a (district court). But it is far from clear that that conclusion is correct: the lower courts may have been excessively influenced by their characterization of the claim as the tort of "malicious prosecution" rather than the correct characterization of the claim as one asserting an unreasonable "seizure" under the Fourth Amendment. The Court in *Manuel* was explicit in saying that the Fourth Amendment seizure ends when the trial begins. 137 S. Ct. at 920 n.8. Logically, therefore, that would be the date on which the claim accrues. The Court has held that a Fourth Amendment claim can accrue while a criminal trial is

ongoing. *See Wallace*, 549 U.S. at 393. And a Fourth Amendment claim can be brought even by a defendant who is convicted. *Heck*, 512 U.S. at 487 n.7. That suggests that the date of a favorable termination—which may not exist—cannot be the accrual date for a claim that an individual was wrongly indicted.

In any event, the complexity of this question is an additional reason for the Court not to address it in a case, like this one, in which it is not presented.

2. Petitioner's "Fabrication Of Evidence" Claim, As It Pertains To The Grand Jury Proceedings, If It Asserts A Constitutional Claim At All, Is A Substantive Due Process Claim Barred By The Statute Of Limitations.

As we have shown, Petitioner's surviving claim is simply that fabricated evidence was used against him. That claim does not depend upon a lack of probable cause. *See, e.g., Garnett*, 838 F.3d at 278 ("[U]sing probable cause as a shield would unduly limit an arrestee's right to relief when a police officer fabricates evidence."); *Ricciuti*, 124 F.3d at 130 ("To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice."). Because this claim—the only surviving claim—does not assert a lack of probable cause, Petitioner's indictment, and any accompanying restraints on him, cannot be attributed to the actions asserted in connection with this claim.

It is therefore unclear why this claim asserts a constitutional violation at all. It does not assert a seizure without probable cause, in violation of the Fourth Amendment, because it does not assert a lack of probable cause. It does not assert that the initiation of criminal proceedings deprived Petitioner of liberty without due process, because any such deprivation of liberty was the result of a finding of probable cause, which this claim does not challenge.

If there is a constitutional violation, it would presumably have to be a substantive due process violation, based on the view that some government conduct is sufficiently outrageous that it violates the Constitution in and of itself. As we have noted, that seems to be the view that motivated the Second Circuit and other courts that have recognized a constitutional claim for "fabrication of evidence." *See, e.g., Ricciuti*, 124 F.3d at 130; *Spencer v. Peters*, 857 F.3d 789, 801 (9th Cir. 2017); *Halsey v. Pfeiffer*, 750 F.3d 273, 293 (3d Cir. 2014).

It goes without saying that fabrication of evidence is reprehensible. An individual who fabricates evidence can be prosecuted for a crime. Lawyers who tolerate such conduct can be subject to professional disciplinary sanctions. But if there is no incursion on an individual's liberty traceable to the fabrication of evidence, it may not infringe on a constitutional right.

There is, however, again no need for the Court to resolve that issue in this case. If there is a constitutional violation of this kind, it accrues when the allegedly outrageous act occurred, subject only to a notice requirement. That is because, as with the Second Circuit's "fabrication of evidence" claim, the conclusion

of the proceedings is irrelevant to the existence of the violation. If this constitutional claim exists, it will be available to any defendant—even one who has been indicted on the basis of probable cause, and even one who has been found guilty on the basis of sufficient untainted evidence. Because such a claim may be brought even when there is no favorable termination of the proceedings, the date (if any) on which that occurs has no bearing on the accrual of the claim. The wrong is complete when it occurs, and it accrues at that point, or whenever the plaintiff becomes aware of it—as the court below held.

3. When Claims Relating To The Alleged Use Of Fabricated Evidence At Trial Are Properly Characterized Under The Constitution, They Are Barred, To The Extent They Exist At All.

Petitioner's claims about the use of fabricated evidence at trial are governed by the Due Process Clause. *See Manuel*, 137 S. Ct. at 920 n.8. The Due Process Clause is violated only if a person is "deprive[d] of liberty." Petitioner was acquitted at trial. Therefore the trial proceedings did not deprive Petitioner of liberty, and it is unclear how anything Petitioner did in the course of the trial could give rise to a claim under the Due Process Clause.

The Court has repeatedly ruled, in cases in which a criminal defendant has sought to overturn a conviction, that government misconduct that interfered with the truth-finding process of the criminal trial does not violate the Due Process Clause unless it had some effect on the outcome of the trial. It is well-established, for example, that the government's failure to disclose

exculpatory or impeaching evidence to a defendant, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), does not violate the Constitution unless the evidence was material. *See United States v. Agurs*, 427 U.S. 97, 106 (1976) ("[S]ince it was not material on the issue of guilt, [Brady's] entire trial was not lacking in due process"). Even a claim that the government knowingly used perjured testimony requires a showing of materiality. *See, e.g., United States v. Bagley*, 473 U.S. 667, 679-80 (1985); *Napue v. Illinois*, 360 U.S. 264 (1959). The burden the government must overcome to show a lack of materiality may be very high: for example, if the government knowingly introduces perjured testimony, it must show that the use of the evidence was harmless beyond a reasonable doubt. *Bagley*, 473 U.S. at 679-80 n.9 (plurality opinion). But if that burden is met, there has been no violation of the Due Process Clause requiring a reversal of the conviction.

It should follow, then, that when a defendant is acquitted, as Petitioner was, there is *a fortiori* no due process violation. The trial did not result in a deprivation of liberty at all. Again, the Court need not, in this case, foreclose the possibility that some government misconduct at trial may be so egregious that it amounts to a constitutional violation—presumably, a substantive due process violation—even if the trial ended in an acquittal. But, as before, any claim asserting such a constitutional violation would accrue when the violation occurred, or when the defendant learned or should have learned of it. If the violation exists irrespective of its effect on the outcome of the trial—which must necessarily be true in this case, because Petitioner was acquitted—then the date on which that outcome occurred is irrelevant. To the extent

that Petitioner is asserting a valid claim for a constitutional deprivation based on Respondent's conduct at trial, the court of appeals applied the correct accrual rule.

II. Petitioner's Remaining Arguments Are Erroneous And Should Be Rejected.

In addition to Petitioner's erroneous argument that his § 1983 claim accrues only upon favorable termination, Petitioner offers several other grounds to reverse the decision below: that his claim was timely under *Heck*; that his claim was timely under the continuing violation doctrine; and a collection of policy arguments supposedly justifying his proposed accrual rule. All of those arguments are incorrect as well.

A. *Heck* And *Preiser* Are Irrelevant.

Petitioner argues that this Court's decisions in *Heck* and *Preiser v. Rodriguez*, 411 U.S. 475 (1973), independently barred this claim prior to acquittal. But the *Heck* bar, which prohibits a § 1983 damages suit when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," 512 U.S. at 487, applies "*only* when there exists ... an 'outstanding criminal judgment.'" *Wallace*, 549 U.S. at 393 (emphasis added). Because Petitioner was never convicted, the Second Circuit correctly ruled that *Heck* did not apply. Pet. App. 15a-16a. Petitioner's approach would create another "bizarre extension of *Heck*," *Wallace*, 549 U.S. at 393. This Court should reject it.

1. *Heck* Does Not Apply Here Because Petitioner Was Never Convicted.

In *Heck*, a state prisoner serving a sentence for manslaughter "filed suit under § 1983 raising claims which, if true, would have established the invalidity of his outstanding conviction." *Wallace*, 549 U.S. at 392. The prisoner did not seek to overturn his conviction or sentence; he sought only monetary damages. Nevertheless, the Court found that even a claim for damages is not cognizable when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487.

Petitioner now invokes *Heck* to delay the accrual of his claim, arguing that his fabrication of evidence claim arose only upon his acquittal because he could not have brought suit before then. Br. of Petitioner 32. But the Court subsequently and carefully defined the limits of the *Heck* bar in *Wallace*—it applies only when there is an outstanding criminal judgment. 549 U.S. at 393. Wallace was arrested and convicted of first-degree murder. That conviction was ultimately vacated, however, and the charges were dropped. *Id.* at 386-87. Wallace then brought a § 1983 suit seeking damages for his unlawful arrest. *Id.* at 387. On appeal, this Court considered whether his suit was timely. Hoping for a later accrual date, Wallace argued that *Heck* "compell[ed] the conclusion that his suit could not accrue until the State dropped its charges against him." *Id.* at 392.

The Court rejected that argument as going "well beyond *Heck*." *Id.* at 393. The *Heck* bar "delays what would otherwise be the accrual date of a tort action until the setting aside *of an extant conviction* which success

in that tort action would impugn." *Id.* *Heck* "rested [its] conclusion upon 'the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of *outstanding* criminal judgments.'" *Id.* at 392 (quoting *Heck*, 512 U.S. at 486) (emphasis added). But there is no bar from bringing "an action which would impugn *an anticipated future conviction.*" *Id.* at 393.

While the Court acknowledged that a false arrest claim might tread the same ground as a future criminal proceeding, "it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended." *Id.* at 393-94; *see also Heck*, 512 U.S. at 487 n.8 ("[I]f a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial abstention may be an appropriate response to the parallel state-court proceedings."). Finding *Heck* posed no obstacle, the Court held that Wallace's claim accrued "immediately upon his false arrest."[3] *Wallace*, 549 U.S. at 390 n.3.

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[3] Though the petitioner's claim accrued then, the common law's "distinctive" treatment of the torts of false arrest and false imprisonment meant that statute of limitations commenced after the date of accrual. *See Wallace*, 549 U.S. at 388-90; *id.* at 390 n.3 ("While the statute of limitations did not begin to run until petitioner became detained pursuant to legal process, he was injured and suffered damages at the moment of his arrest, and was entitled to bring suit at that time."). Wallace thus could have sued for his false arrest immediately, but the statute of limitations did not run until legal process began. That distinction is irrelevant here: Petitioner argues he was barred from suing until favorable

Wallace forecloses Petitioner's argument—where there is no outstanding judgment, the *Heck* bar is irrelevant. Like the § 1983 plaintiff in *Wallace*, whose claim accrued at the moment of his arrest, Petitioner could bring his fabrication claim as soon as he had a "complete and present cause of action," *Rawlings v. Ray*, 312 U.S. 96, 98 (1941), which occurred when Petitioner learned of the fabrication and it was used against him. Pet. App. 10a. He did not need to wait for acquittal to sue.

2. Petitioner's Newly-Minted Argument Under *Preiser* Is Foreclosed By *Wallace*.

Petitioner now attempts to contest this by invoking *Preiser* for the first time in these proceedings. *Preiser* held that a convicted prisoner could not bring a § 1983 claim where "the relief he seeks is a determination that he is entitled to immediate release or speedier release"; in such situations, habeas corpus is the sole remedy. 411 U.S. at 500. But Petitioner claims that *Preiser*, when read together with *Heck*, in fact stands for a far broader proposition: that a suit that would have the effect of challenging the validity of *any* custody cannot be brought prior to the claimant's release from that custody—regardless of whether that custody stems from a conviction. *See* Br. of Petitioner 33.

To the extent that this Court even considers Petitioner's new *Preiser* argument, it should reject it. For one thing, as the case comes to this Court, Petitioner does not even challenge the lawfulness of his pre-trial

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termination and so the claim did not *accrue* until then. Br. of Petitioner 34.

custody; his only remaining claim is one based on "fabrication of evidence," which is, as we have explained, a substantive due process claim that does not involve showing a lack of probable cause. That claim can be brought even if Petitioner was lawfully indicted and bound over for trial. The validity of his custody is therefore simply not at issue here.

Wallace forecloses Petitioner's *Preiser* argument as well. Petitioner tries to distinguish it by contending, in a footnote, that *Wallace* had no occasion to analyze *Preiser*'s effect on accrual—"[a]t the time the suit was filed, the plaintiff was not in custody." Br. of Petitioner 34 n.10. As the plaintiff was no longer in custody, Petitioner argues, *Preiser* did not bar a § 1983 damages claim challenging the lapsed custody's validity. But *Wallace* stated that the plaintiff could have sued even while in custody: "*There can be no dispute* that petitioner could have filed suit as soon as the allegedly wrongful arrest occurred, subjecting him to the harm of involuntary detention." *Wallace*, 549 U.S. at 388 (emphasis added); *see* also 390 at n.3 ("This is not to say, of course, that petitioner could not have filed suit immediately upon his false arrest. . . . [H]e was injured and suffered damages at the moment of his arrest, and was entitled to bring suit at that time."); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (stating, in the context of reviewing a § 1983 claim, that "as the Court of Appeals noted below a suspect who is presently detained may challenge the probable cause for that confinement").

B. Petitioner's Claim Is Not Timely Under The Continuing Violation Doctrine.

Petitioner contends that even if his claim first accrued when he had notice of it, it would still be timely

under the continuing violation doctrine because the claim would "accrue[] afresh from day to day" throughout the criminal proceedings. while he suffered injury. Br. of Petitioner 45 (quoting *Hamilton v. Manhattan Ry. Co.* 9 N.Y.S. 313, 315 (Sup. Ct. 1890)). That is incorrect. Not only is Petitioner's claim not subject to the continuing violation doctrine, but it would be untimely even if it were.

1. The Continuing Violation Doctrine Does Not Apply To Petitioner's Claim.

Petitioner's contention that he was subject to a continuing violation is incorrect for several reasons. This contention, too, runs squarely into this Court's decision in *Wallace*, a decision Petitioner does not even mention in connection with this argument. *Wallace* held both (1) that ongoing detention merely "forms part of *the damages*" for Fourth Amendment, pretrial-detention claims and (2) that such claims do not accrue on "the date of [plaintiff's] release from custody," but, rather, when the wrongful act or omission resulting in detention occurs. 549 U.S. at 388, 390-91 (emphasis added).

Specifically, after Wallace served eight years in prison, the courts overturned his conviction on the ground that his confession was the product of an unlawful arrest. *Id.* at 387. Wallace then sought damages under § 1983 for the years of detention that followed from the false arrest. In deciding when the limitations period began to run on that Fourth Amendment claim, the Court applied "the standard rule that [accrual occurs] when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Id.* at 388 (quotation marks and citations omitted) (alteration in original). And the

Court recognized that Wallace "could have filed suit as soon as the allegedly wrongful [warrantless] arrest occurred, subjecting him to the harm of involuntary detention." *Id.*

That "standard rule" makes short work of Petitioner's continuing violation theory. Petitioner was injured, if ever, as soon as he was "subject[ed] ... to ... harm." *Id.* At that point, he had notice of a "complete and present cause of action," and his claim accrued. *Id.* As the Second Circuit explained below, "[t]he continuation of the prosecution does not, by itself, constitute a continuing violation that would postpone the running of the statute of limitations until his acquittal." Pet. App. 17a.

To be sure, Petitioner may have suffered additional injury during the course of any deprivation of right, but a claim accrues when the plaintiff has suffered *some* injury, and not the full measure of the injury ultimately claimed. *Wallace*, 549 U.S. at 391; *see also Manuel*, 137 S. Ct. at 927 ("[While] damages resulting from an unlawful seizure may continue to mount during the period of confinement caused by the seizure ... no new Fourth Amendment seizure claims accrue after that date." (Alito, J., dissenting)).

2. Even If The Continuing Violation Doctrine Did Apply, Petitioner's Claim Would Still Not Be Timely.

Even where the doctrine applies, the continuing violation doctrine renders a claim timely only if "an act contributing to the claim occurs within the filing period." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). Petitioner's surviving claim is for violation of his

"Constitutional Right Not to be Deprived of Liberty as a Result of Fabrication of Evidence." J.A. 251. Petitioner filed suit on December 18, 2015. Pet Br. 30. Assuming arguendo the doctrine applies to § 1983 suits, it cannot apply here unless Petitioner alleges "an act contributing to the claim"—*i.e.*, an act depriving him of liberty as a result of fabrication of evidence, which is the Second Circuit claim he now presses—occurred on or after December 18, 2012. He does not.

a. Ever Where The Continuing Violation Doctrine Applies, The Violation Must Extend Within The Limitation Period.

The Court has made clear that the continuing violation doctrine requires at least one timely instance of culpable conduct. In *Havens Realty Corp. v. Coleman*, the Court held that the Fair Housing Act's limitations period did not bar claims based on a "continuing violation manifested in a number of incidents—including *at least one* that is asserted to have occurred within the 180-day period." 455 U.S. 363, 381 (1982) (emphasis added). *Morgan* followed suit with respect to Title VII's 180 or 300 day deadline to file a charge with the Equal Opportunity Employment Commission, noting that "the employee need only file a charge within 180 or 300 days of *any act that is part of the hostile work environment*." 536 U.S. at 118 (emphasis added). Thus, where culpable conduct beyond the limitation period is part of a continuing violation that includes at least one instance of culpable conduct within the period, the non-barred conduct redeems its older relatives.

Petitioner's other cited decisions do not contradict the *Havens* and *Morgan* rule that the continuing violation doctrine applies only if at least one instance of culpable conduct occurs within the limitation period.[4] Likewise, Petitioner's cited decisions involving malicious prosecution claims are inapposite for the reasons discussed earlier in Part I: the statute of

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[4] *See Hamilton v. Manhattan Ry. Co.*, 9 N.Y.S. 313, 314 (Sup. Ct. 1890) (a six-year limitation bars recovery for damages arising more than six years before the action commenced); *Drews v. Williams*, 23 So. 897, 899-900 (La. 1898) (observing, with respect to a one-year limitation, that "[i]njury runs from the day the damage was sustained (Rev. Civ. Code, § 3502), but the pleader must prove that the damages were incurred the year preceding the institution of the suit"); *Whelan v. Abell*, 953 F.2d 663, 673 (D.C. Cir. 1992) (continuing tort requires "at least one injurious act within the limitation period"); *Foss v. Whitehouse*, 48 A. 109, 112 (Me. 1901) (*barring* recovery for damages claims plaintiff could have raised in an earlier, successfully prosecuted tort suit); *Heard v. Sheahan*, 253 F.3d 316, 319 (7th Cir. 2001) (limitation statute for alleged Eighth Amendment violation via refusal to provide medical treatment did not start until the duty to treat ended, *i.e.*, upon release from custody); *DePaola v. Clarke*, 884 F.3d 481, 487 (4th Cir. 2018) (observing with respect to an Eighth Amendment claim for refusal to provide medical treatment that "this principle does not apply to claims that fail to identify acts or omissions within the statutory limitation period that are a component of the deliberate indifference claim"); *Shackelford v. Staton*, 23 S.E. 101, 102 (N.C. 1895) (rejecting plaintiff's argument that the limitation period ran from the date on which she was damaged by clerk of the court's failure to index a judgment, and holding that the period ran from the date of the clerk's last omission, *i.e.*, the day he ceased to be a clerk).

limitations for a malicious prosecution claim cannot begin to run before proceedings terminate favorably where a court has concluded that favorable termination is an element of the claim. *See Wilkinson v. Goodfellow-Brooks Shoe Co.*, 141 F. 218, 221 (C.C.E.D. Mo. 1905) (holding, in "an action for malicious prosecution," that "the institution of the proceedings and the subsequent appeal, if wrongfully done, constitute but one continuous tort for the purpose of this case"). But there is no longer a malicious prosecution claim in this case. Petitioner's surviving claim, for "fabrication of evidence," can accrue not just before, but even in the absence of, favorable termination. The limitations period for that claim therefore began to run once Petitioner learned of the uses of the allegedly fabricated evidence.

b. Petitioner Cannot Identify Any Violation In Connection With His Indictment Or Trial That Would Give Him A Timely Claim Under The Continuing Violation Doctrine.

The relevant uses of allegedly fabricated evidence in this case fall into two groups: (1) the presentation of allegedly fabricated evidence to the grand jury that indicted Petitioner; and (2) the use of allegedly fabricated evidence at the trial itself.

To the extent Petitioner claims misconduct caused him to be indicted and bound over for trial, that cannot form the basis of a continuing violation. For one thing, that claim must assert that probable cause was lacking; otherwise the claim cannot establish a causal connection to the indictment or to any resulting deprivation of liberty. *See supra* pp. 17-19 & note 2. The claim that asserts a lack of probable cause is Petitioner's "malicious

prosecution" claim, which is barred by absolute immunity and is not before the Court. *See supra* pp. 21-23. The "fabrication of evidence" substantive due process claim that is before the Court does not involve a showing of a lack of probable cause and is therefore unconnected to any deprivation of liberty resulting from the indictment.

Even if a claim that the indictment was procured without probable cause *were* before the Court, *Wallace* precludes any argument that such a claim states a continuing violation, as we have explained. *See supra* pp. 32-33.

As for the alleged use of fabricated evidence at Petitioner's trials, the fact that Petitioner was acquitted precludes any use of the "continuing violation" doctrine. A defendant who alleges that he was *convicted* because of fabricated evidence has a basis to claim that his trial must be evaluated as a whole and that his claim did not accrue until judgment was entered. Even then, it is unnecessary to use the "continuing violation" rubric. The analysis follows straightforwardly from the language of the Due Process Clause: the judgment of conviction deprives such a defendant of liberty, and the trial is then considered to determine if he received due process.

When a defendant is *acquitted*, the continuing violation doctrine is even more obviously inapplicable. The judgment of acquittal obviously does not deprive such a defendant of liberty, and there is no reason to examine the overall fairness of the trial. In fact, in this case the *only* event that occurred within the three year limitations period was the jury's verdict acquitting Petitioner—and, whatever else might be said, an

acquittal certainly does not violate a defendant's rights. Petitioner filed this suit on December 18, 2015 (Pet. App. 6a); closing arguments in his second trial were heard, and jury deliberations began prior to December 18, 2012. Pet. App. 52a-53a.

Even apart from the specific facts of this case, however, when a defendant is acquitted, and therefore not deprived of liberty, it is unclear that any actions the government took at trial, however wrongful in some other sense, can violate the defendant's constitutional rights. But if those actions do violate the Constitution—perhaps on a substantive due process theory, as we have said—they are just that: actions that violated the Constitution, unconnected to the verdict of the jury. It may be appropriate, in deciding whether there is a substantive due process violation, to consider the acts of misconduct in the aggregate; that will depend on the nature of the acts and the contours of the applicable substantive due process principle, if any. But in any event, the constitutional claim accrues, at the latest, when the last such act occurred. Nothing after that could have adversely affected the defendant in any sense.

C. Policy Considerations Favor Starting The Limitations Period Once The Claimant Learns That Fabricated Evidence Has Been Used To Deprive The Claimant of Liberty

The Second Circuit's rule is sound policy as well as sound law.

First, applying the standard accrual rule "serves the same 'basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and

certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Young v. United States*, 535 U.S. 43, 47 (2002) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (alteration in original)).

Petitioner asserts that public officials "will be unable to calculate with certainty when their Section 1983 liability draws to a close" under the Second Circuit's rule. Br. of Petitioner 52. But his own theory offers public officials little certainty and less repose. Because favorable termination may come in the form of long-delayed post-conviction relief, claims could suddenly accrue decades after the alleged injury—regardless of when the claimant learned about the fabrication. So long as the criminal case's disposition wends its way through the courts—at trial, on appeal, on collateral attack—officials would remain unsure of whether they might suddenly be subject to suit. A statute of limitations in which a favorable termination years after a conviction "retroactively extend[s]" a cause of action for a *pre-conviction* violation is "hardly a statute of repose." *Wallace*, 549 U.S. at 395. The sudden, belated accrual of a fabrication claim would likewise give no notice "to preserve beyond the normal limitations period evidence that will be needed for their defense." *Id.* As the Court has specifically noted, to argue that "law enforcement officers would prefer the possibility of a later § 1983 suit to the more likely reality of an immediate filing... is both implausible and contradicted by those who know best." *Id.* at 397.

Put another way, the accrual rule Petitioner attacks is the rule that we already have. Many causes of action accrue when a claimant "knew or should have known" of their injury, and the courts and litigants have taken it in

stride. *See, e.g., Merck & Co. v. Reynolds*, 559 U.S. 633, 645-46 (2010) (cataloging claims that "accrue when the litigant first knows or with due diligence should know facts that will form the basis for an action" (citing authority)). Petitioner asserts that the "favorable termination" rule is more definite than this rule, but there is no reason to believe that is true. *See generally Cordova*, 816 F.3d at 664 (Gorsuch, J., concurring in the judgment). Some states treat the "favorable termination" element as requiring that the termination of criminal proceedings indicates innocence. *Miles v. Paul Mook of Ridgeland, Inc.*, 113 So. 3d 580 (Miss. Ct. App. 2012). Others view it as requiring only that the criminal prosecution be dismissed, even if by a *nolle prosequi*. *Glover v. City of Wilmington*, 966 F. Supp. 2d 417, 426 (D. Del. 2013). Indeed, as then-Judge Gorsuch observed, New Mexico has dropped the favorable-termination element altogether: "[U]nder the terms of New Mexico tort law it's settled that a plaintiff doesn't need to prove any kind of favorable termination at all." *Cordova*, 816 F.3d at 662 (Gorsuch, J., concurring in the judgment). There is no reason for this Court to import a requirement that has proven troublesome and to push aside the normal accrual rules that have worked well.

Second, and related, the Second Circuit's rule is more workable. Petitioner bemoans the potential for parallel proceedings, but *Wallace* specifically addressed this issue, and specifically rejected the argument that it justifies a delayed accrual date. As *Wallace* observed, when a claimant files a claim "related to rulings that will likely be made in a pending or anticipated criminal trial," "it is within the power of the district court and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case... is

ended." *Wallace*, 549 U.S. at 393-94; *see also Heck* 512 U.S. at 487 n.8 ("[I]f a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel state-court proceedings"). It is simply not that unusual for criminal and civil actions dealing with overlapping matters to be pending simultaneously. For example, the government, or private parties, may bring civil actions at the same time as a criminal prosecution dealing with the same subject and the same defendants. There is no special accrual rule in those circumstances; trial judges manage the cases in an appropriate way.

In cases alleging misconduct in connection with a criminal prosecution, it is especially important that claims be filed in a timely fashion, even if they are ultimately stayed. Law enforcement officers deal with dozens, sometimes hundreds, of cases in a year. It will be difficult for them to testify accurately, long after the fact, about the specific details of a case that did not stand out in any way, unless they are on notice that they might have to do so. For that reason, the Court has explicitly recognized that "[s]tates and municipalities have a strong interest in timely notice of alleged misconduct by their agents." *Wallace*, 549 U.S. at 397 (quoting Brief for State of Illinois et al. as *Amici Curiae* 18).

Third, a favorable termination element poses the risk of barring meritorious claims. Petitioner expresses concern that "filing a civil suit will provoke prosecutors to seek greater penalties, or to avoid dropping charges, in the proceedings against them." Br. of Petitioner 55. This is exactly backwards. Insofar as the Court is concerned about abusive government actors, adopting a

rule whereby they can be sued only upon favorable termination offers those actors a powerful incentive to ensure that the proceedings do not terminate favorably—especially given the potential lack of clarity about what a "favorable termination" is.

Respondent recognizes that § 1983 is meant "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). "A rule of law foreclosing civil recovery against police officers who fabricate evidence, so long as they have other proof justifying the institution of the criminal proceedings against a defendant, would not follow the statute's command or serve its purpose." *Halsey*, 750 F.3d at 292-93. Nor would it serve the statute's purpose to foreclose civil recovery whenever officers can obtain an unfavorable termination.

These are not hypothetical considerations. For example, in *Margheim v. Buljko*, 855 F.3d 1077 (10th Cir. 2017), the court held that the plaintiff could not pursue his constitutional claims for unlawful post-process, pre-trial detention because prosecutors nolled his case, and the federal courts held that the *nolle prosequi* was not a favorable termination. *See also Donahue v. Gavin*, 280 F.3d 371, 384 (3d Cir. 2002) (holding that a *nolle prosequi* does not indicate innocence where "[t]he prosecutor simply reasoned that [the plaintiff] was not likely to receive any additional jail time if convicted in a retrial").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 18-485

IN THE
Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE
Supreme Court of the United States

No. 18-485

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

INTRODUCTION

The Court granted certiorari to decide when the statute of limitations on a Section 1983 claim alleging fabrication of evidence begins to run. Rather than engage in any meaningful way with that question—or with the opening brief—Smith disputes whether McDonough has a Section 1983 claim at all, whether Smith is shielded by absolute immunity, and whether the Second Circuit's ruling on a separate claim somehow forecloses this one. Those arguments are wrong, forfeited, and not encompassed within the question presented.

McDonough's opening brief scrupulously follows this Court's approach to analyzing the "contours and prerequisites" of a Section 1983 claim. *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920-921 (2017) ("*Manuel I*"). The "constitutional right at issue" is the right not to be deprived of liberty on the basis of fabricated evidence, which violates both the Fourth and Fourteenth Amendments. *Id.* at 920 (internal quotation marks omitted). The "most analogous tort" is malicious prosecution. *Id.* The statute of limitations for that tort does not begin to run until criminal proceedings terminate in a defendant's favor. The reasons for that common law rule—to avoid parallel litigation and conflicting resolutions in different courts—apply equally here and are fully consonant with the constitutional right to be protected. *Id.* at 921. The Court should therefore adopt that limitations rule and hold that McDonough's claim is timely.

Smith complains that McDonough has "resolutely refuse[d]" to identify the constitutional right at issue. Resp. Br. 1. That is simply untrue: Smith violated the Fourth and Fourteenth Amendments by fabricating evidence that led to criminal proceedings and hence the deprivation of McDonough's liberty. Pet. App. 10a, 57a, 105a-106a; JA249-253, ¶¶ 1198-1213. This Court does not need to take up in this case whether Smith violated the Fourth Amendment, the Fourteenth Amendment, or both. Nor need it decide *all* the elements that McDonough will eventually have to prove to win on the merits. Those are not jurisdictional questions, they are not encompassed within the question presented, and they do not affect when the statute of limitations on McDonough's claim began to run. *See* U.S. Br. 13. Wherever

McDonough's claim is textually housed, the common law analog is the same, and the compelling reasons for delaying the onset of the limitations period are the same.

Smith also argues that the liberty deprivation suffered by McDonough cannot be attributed to the fabricated evidence. According to Smith, McDonough "does not assert a lack of probable cause," and any deprivation of liberty was caused solely by the existence of probable cause rather than by the fabricated evidence. Resp. Br. 23-24. That is wrong. Most obviously, the District Court found that McDonough *did* sufficiently allege a lack of probable cause. Pet. App. 56a, 105a. Further, although McDonough must show that "the deprivation of liberty" was "a legally cognizable result of the initial misconduct" to obtain compensatory damages under Section 1983, *Zahrey* v. *Coffey*, 221 F.3d 342, 351 (2d Cir. 2000); *see Carey* v. *Piphus*, 435 U.S. 247, 254-255 (1978), the absence of probable cause is only one way to make that showing. As the Second Circuit has recognized, fabricated evidence may contribute to the decision to initiate and maintain criminal proceedings—and thus cause a liberty deprivation—even where there is other evidence establishing probable cause. *See Garnett* v. *Undercover Officer C0039*, 838 F.3d 265, 277 (2d Cir. 2016); *see also Black* v. *Montgomery Cty.*, 835 F.3d 358, 369-372 (3d Cir. 2016); *Halsey* v. *Pfeiffer*, 750 F.3d 273, 285 (3d Cir. 2014) (describing prosecutor's acknowledgment that "he would not have charged" the defendant in the absence of the fabricated evidence).

Smith also suggests that McDonough's fabrication of evidence claim is somehow subsumed within his

Section 1983 malicious prosecution claim. *See* Resp. Br. 1-2. Not so. As Smith and the Second Circuit recognized, Section 1983 claims based on fabrication of evidence and malicious prosecution are distinct, Pet. App. 15a & n.12, and have "different elements," Resp. Br. 2. To state the obvious, McDonough's fabrication of evidence claim involves *fabricating evidence*, while his malicious prosecution claim focuses on Smith's malice and the lack of justification for the criminal proceedings. The dismissal of one claim thus does not entail the dismissal of the other. And *distinct* constitutional claims can share the same common law analog. *See, e.g.*, *Heck* v. *Humphrey*, 512 U.S. 477, 483-484 (1994).

Finally, Smith opines that the Second Circuit's rule would be better for both civil rights plaintiffs and prosecutors. But that is flatly "contradicted by those who know best." *Wallace* v. *Kato*, 549 U.S. 384, 397 (2007). The criminal defense and civil rights bars have overwhelmingly rejected the Second Circuit's limitations rule. *See* Criminal Defense Organizations et al. Amicus Br. 3-25; Innocence Network Amicus Br. 15-38; Criminal Justice Institute Amicus Br. 4-13. And so have the Department of Justice and an organization comprised largely of former prosecutors. *See* U.S. Br. 9-28; *see also* Center on the Administration of Criminal Law et al. ("CACL") Amicus Br. 6-23.

In short, the Second Circuit's rule is unsupported by precedent or policy. This Court should reverse.

ARGUMENT

I. THE STATUTE OF LIMITATIONS FOR MCDONOUGH'S SECTION 1983 CLAIM DID NOT BEGIN TO RUN UNTIL FAVORABLE TERMINATION UNDER THIS COURT'S "ANALOGOUS TORT" ANALYSIS.

This Court has repeatedly set forth the proper analytical approach for answering the question presented. *Manuel I*, 137 S. Ct. at 920. The "threshold inquiry" is "to identify the specific constitutional right at issue." *Id.* (internal quotation marks omitted). Then, to determine the "rule of accrual" for that constitutional right, "courts are to look first to the common law of torts." *Id.* Specifically, courts must pinpoint "the most analogous tort" at common law, which "guide[s] * * * the definition" of the Section 1983 claim. *Id.* at 920-921. Sometimes that means "adopt[ing] wholesale the rules that would apply in a suit involving the most analogous tort," though not in every case. *Id.* at 920. "In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Id.* at 921. McDonough's opening brief followed to a tee this well-trod framework. Smith all but ignores it.

The "constitutional right at issue" here, *id.*, is a violation of two provisions of the Constitution. *See* JA251-253, ¶¶ 1209-1213; Pet. Br. 2, 23, 39-43. First, depriving McDonough of liberty on the basis of fabricated evidence is a "classic * * * violation" of the Due Process Clause. *Zahrey*, 221 F.3d at 348; *see* Pet. Br. 39-41; U.S. Br. 13-15. It is also an "unreasonable * * * seizure[]" of his person, in violation of the Fourth Amendment. U.S. Const. amend. IV, *see*

Albright v. *Oliver*, 510 U.S. 266, 277-280 (1994) (Ginsburg, J., concurring); Pet. Br. 41-42. Even Smith does not appear to dispute that to deprive a person of liberty on the basis of fabricated evidence violates the Constitution; it is, after all, "self-evident" that "those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 100 (1st Cir. 2013) (internal quotation marks omitted). Smith and his amici instead argue that McDonough has somehow erred in his contention—seconded by the United States—that there is no need for the Court to use this case to decide whether the deprivation of McDonough's liberty is best viewed as a violation of the Fourth Amendment, the Fourteenth Amendment, or both. But as McDonough explained, nothing turns on that distinction here because the Fourth and Fourteenth Amendments both lead to the same limitations rule.

The next step in the analysis is to identify the "common-law cause of action" that "provides the closest analogy to claims of the type considered here." *Heck*, 512 U.S. at 484; *Wallace*, 549 U.S. at 388. For McDonough's claim, the most analogous cause of action is malicious prosecution. *See* Pet. Br. 14-15, 23-24; U.S. Br. 17-20. Although Smith acknowledges that common law principles "guide" the definition of Section 1983 claims, he does not bother to identify any common law tort that is more analogous to McDonough's claim than malicious prosecution. Resp. Br. 15 (quoting *Manuel I*, 137 S. Ct. at 921). There is no disagreement, then, on this core issue: "The common-law cause of action" that "provides the closest analogy to claims of the

type considered here" is malicious prosecution. *Heck*, 512 U.S. at 484; *Wallace*, 549 U.S. at 388.[1]

Accordingly, the limitations rule applicable to malicious prosecution at common law "guide[s]" the Court's consideration of when the limitations period began to run on McDonough's Section 1983 claim based on fabrication of evidence. *Manuel I*, 137 S. Ct. at 921; *Wallace*, 549 U.S. at 388-389. At common law, the limitations clock for malicious prosecution is subject to a "distinctive" rule: It begins to run at favorable termination. *Bradford* v. *Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015) (noting "distinctive" rule for malicious prosecution); *see Manuel I*, 137 S. Ct. at 924 (Alito, J., dissenting) (noting "unique accrual rule" for malicious prosecution). If applied to McDonough's Section 1983 claim, that rule would serve the essential function of mediating parallel civil and criminal proceedings and would assist criminal defendants in vindicating their rights. *See* Pet. Br. 28-30. As in *Wallace*, the "distinctive" common law limitations rule should therefore govern fabrication of evidence claims like McDonough's. 549 U.S. at 388-389.

The United States argues that there is "no distinctive accrual rule for claims of malicious prosecution at common law." U.S. Br. 10, 21. Instead, the United States contends that favorable termination is

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[1] Smith suggests that malicious prosecution would not be an appropriate analog if lack of probable cause is not an element of McDonough's ultimate claim. Resp. Br. 3-4. But the fact that a Section 1983 claim and a common law claim do not share identical elements does not mean that they are not analogous, and, again, Smith does not identify a better analogy.

simply an "element" of the tort of malicious prosecution, dictating the limitations period under the "standard" rule for accrual. *Id.* But a key reason favorable termination is an element of the common law tort of malicious prosecution is precisely because it delays the onset of the limitations period. *Heck*, 512 U.S. at 484-486; *see Erlin* v. *United States*, 364 F.3d 1127, 1131 (9th Cir. 2004). In other words, the element regulates the relationship between parallel proceedings for a tort that will necessarily invite such proceedings. *See* W. Page Keeton et al., Prosser and Keeton on Torts § 119, at 874 (5th ed. 1984) (favorable termination requirement reflects "a belief that the malicious prosecution action should not be tried at a time when it might tend to chill testimony in the criminal action"). Given that an essential function of requiring favorable termination is to control the onset of the limitations period, it makes perfect sense for the Court simply to adopt the limitations rule directly.

Indeed, the very treatise this Court cited in *Wallace* to support its conclusion that false arrest claims are subject to a "distinctive" limitations rule, 549 U.S. at 389 (citing 2 H. G. Wood, A Treatise on the Limitation of Actions at Law and in Equity § 187d(4), at 878 (rev. 4th ed. 1916)), describes malicious prosecution claims in identical terms. The treatise explains that, although limitations periods for personal injury actions generally begin to run "from the date of the injury," both false imprisonment and malicious prosecution are subject to a different rule: "Limitations begin to run against an action for false imprisonment when the alleged false imprisonment ends; and against an action for malicious prosecution when the prosecution is ended or abandoned." Wood,

supra, § 187d(4), at 878 (footnotes omitted). The Court should do here what it did in *Wallace*: apply the common law's "distinctive" limitations rule for malicious prosecution to McDonough's analogous Section 1983 claim. 549 U.S. at 389. Under that analysis, McDonough's suit is timely, and the Court need not address whether favorable termination is an element of his claim.[2]

II. MCDONOUGH'S CLAIM IS TIMELY UNDER THE "STANDARD" RULE FOR ACCRUAL.

A. Because *Preiser* And *Heck* Foreclose Section 1983 Claims Before Favorable Termination, Such Claims Do Not Accrue Until That Point.

Under the "standard" accrual rule, a limitations period does not begin to run until a "plaintiff is permitted to file suit." *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 106 (2013). Under *Preiser* and *Heck*, McDonough was not permitted to file suit until he was acquitted, rendering his suit timely.[3]

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[2] As this Court recognized in *Wallace*, a criminal defendant may be entitled to bring a Section 1983 suit before the statute of limitations begins to run. 549 U.S. at 389-390 & n.3. *Heck* and *Preiser*, however, would likely bar suit prior to favorable termination in most cases. *See infra* pp. 9-13.

[3] Smith states in passing that this argument is waived. Resp. Br. 11. That is clearly wrong. McDonough raised the argument in the Second Circuit. Br. for Plaintiff-Appellant 30, *McDonough* v. *Smith*, No. 17-296 (2d Cir. Mar. 23, 2017) (arguing that *Heck* bars claims that "necessarily would impugn the integrity of the entire process and any conviction"). And the Second Circuit passed on it. Pet. App. 15a-16a; *see* U.S. Br. 28.

That conclusion flows from two settled legal propositions. First, when a person in state custody wishes to challenge the lawfulness of that custody, "his sole federal remedy is a writ of habeas corpus." *Preiser* v. *Rodriguez*, 411 U.S. 475, 500 (1973); *see Heck*, 512 U.S. at 481. Second, a person in custody cannot circumvent the exclusivity of habeas by filing a damages action under Section 1983; if awarding damages would "necessarily imply the invalidity" of a person's state custody, that person must proceed first through habeas. *Heck*, 512 U.S. at 487. It follows from these propositions that McDonough was unable to challenge the lawfulness of his custody through a Section 1983 suit while he was still in custody—*i.e.*, before the termination of the criminal proceedings. That is a matter of "[s]imple legal logic, resting upon settled case law." *Medtronic, Inc.* v. *Mirowski Family Ventures, LLC*, 571 U.S. 191, 198 (2014).

1. Smith does not challenge either of those legal propositions. Nor does he dispute that "a person released on personal recognizance" with travel restrictions pending trial—as McDonough was—"is in custody for purposes of the federal habeas corpus statutes" throughout the criminal proceedings. *Justices of Bos. Mun. Court* v. *Lydon*, 466 U.S. 294, 301 (1984). Instead, citing *Wallace*, he claims that "where there is no outstanding judgment, the *Heck* bar is irrelevant." Resp. Br. 30. That misses the point. Although *Heck* dealt with a state prisoner who was in custody pursuant to a criminal conviction, the logic of that opinion plainly applies to other forms of custody. *Preiser* had explained that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody," 411 U.S. at 484, and held that a person seeking release from

custody must proceed through habeas rather than Section 1983, *id.* at 500. Though *Preiser* did not by its own terms cover actions for damages, *Heck* explained that *Preiser* cannot be circumvented by filing a Section 1983 "damages claim[] that [would] call into question the lawfulness of conviction *or confinement*," 512 U.S. at 483 (emphasis added)—that is, the "legality" of a person's "custody," *Preiser*, 411 U.S. at 484.

As Smith points out, *Wallace* described *Heck* as "delay[ing] what would otherwise be the accrual date of a tort action until the setting aside *of an extant conviction* which success in that tort action would impugn." 549 U.S. at 393. But the Court was describing the holding of *Heck* in the context of its facts. Nowhere in *Wallace* or *Heck* does the Court hold that other forms of "*extant*" custody are governed by a different rule. Indeed, the upshot of Smith's position is that a criminal defendant in prison awaiting trial could challenge his or her detention through a Section 1983 damages suit—an outcome that cannot be squared with *Heck* and *Preiser*. Further, although *Wallace* rejected the proposition that "an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside," that has no bearing here. *Id.* McDonough's position is that an action that would impugn *present state custody* cannot be brought until that custody ends or is successfully challenged through habeas.[4]

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[4] The Court in *Wallace* noted that the plaintiff there "could have filed suit as soon as the allegedly wrongful arrest occurred." 549 U.S. at 388. But the Court was describing when the

Wallace did not address whether Section 1983 suits are barred when they would necessarily undermine the validity of present custody. Indeed, neither petitioner's nor respondents' briefs in *Wallace* cited *Preiser* or considered the Court's dictates regarding the breadth of the term "custody." Those concepts simply were not implicated: The criminal defendant in *Wallace* was not in custody when he filed suit; any restriction on filing a Section 1983 suit would have been immaterial during his initial false imprisonment because the statute of limitations did not begin to run, *id.* at 390; and a suit challenging the criminal defendant's *initial* arrest would not necessarily have impugned his custody following legal process. *See Heck*, 512 U.S. at 487 n.7; Federal Courts Scholars Amicus Br. 26-27; Criminal Justice Institute Amicus Br. 18. *Wallace* therefore did not present—let alone decide—the question at issue here.

2. Smith's only remaining argument against the application of *Heck* and *Preiser* is that McDonough's suit, if filed before his acquittal, would not have impugned the validity of the restrictions on his liberty. *See* Resp. Br. 30-31. That is incorrect. As explained in McDonough's opening brief and by the United States, the gravamen of McDonough's suit is that he was wrongfully subjected to the initiation and maintenance of criminal proceedings based on fabricated evidence. If McDonough had successfully challenged the institution or maintenance of criminal

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elements of the Section 1983 claim were met, not whether *Preiser* and *Heck* would have erected a bar to suit.

proceedings against him, then the restrictions on his liberty would be invalid and his custody unlawful.[5]

B. The Court Should Adopt Favorable Termination As An Element Of McDonough's Section 1983 Claim.

If the Court determines that it must look to the elements of McDonough's claim to answer the limitations question, it should hold that favorable termination is required. Smith's short response to this argument is wholly unpersuasive; indeed, his entire discussion does not cite a single case or other legal authority. Resp. Br. 19-21.

Smith's main contention is that favorable termination should not be required "because a valid 'fabrication' claim can be brought by an individual against whom the government has probable cause to proceed." *Id.* at 19-20. First of all, the purpose of requiring favorable termination is to "avoid[] parallel litigation" and "conflicting resolutions." *Heck*, 512 U.S. at 484 (internal quotation marks omitted). Regardless of whether lack of probable cause is an element of a Section 1983 claim based on fabrication of evidence, requiring criminal proceedings to terminate before a criminal defendant sues for damages performs the important functions identified in *Heck*.

Further, while courts have allowed Section 1983 claims based on fabrication of evidence to proceed

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[5] That is true whether or not probable cause is an element of McDonough's Section 1983 claim. Either way, to obtain compensatory damages McDonough will have to show some causal connection between the fabrication and the deprivation of liberty, *Zahrey*, 221 F.3d at 350-351, necessarily demonstrating that the deprivation was unlawful.

even when there is probable cause, *see, e.g.*, *Spencer* v. *Peters*, 857 F.3d 789, 801 (9th Cir. 2017), they have still generally required a causal link between the fabricated evidence and the deprivation of liberty to recover compensatory damages, *see supra* p. 3.[6] Favorable termination will often be probative of causation: If a defendant is acquitted, it will tend to show that the criminal case would not have been brought or maintained without the fabricated evidence; if a conviction is vacated on appeal or habeas review, it will tend to show that the fabricated evidence caused the wrongful charges and conviction in the first place. U.S. Br. 25-26.

Smith also contends that favorable termination should not be required because a criminal defendant might have a valid Section 1983 claim even if he has been convicted. Resp. Br. 20. The simple response is that convicted defendants are already barred by *Heck* from filing a civil suit seeking damages based on the fabrication of evidence to the extent that suit would necessarily impugn the conviction. 512 U.S. at 486-487. If the suit would *not* impugn the criminal conviction, it is difficult to see how the fabrication of evidence could have caused any deprivation of liberty for the defendant. *See Black*, 835 F.3d at 370-371.[7] The broad amicus support from the criminal

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[6] In the *Brady* context, this Court has recognized that a deprivation of liberty may be attributable to the denial of due process even where there is otherwise sufficient evidence to convict. *See Kyles* v. *Whitley*, 514 U.S. 419, 434-435 (1995).

[7] It is possible to imagine Section 1983 suits involving fabricated evidence that might have a different common law analog and that might not have favorable termination as an element. Pet. Br. 25-26. But in a case like this, where the proper analogy is

defense and civil rights bars, moreover, reinforces that delayed accrual would not disadvantage criminal defendants seeking to vindicate their constitutional rights. *See supra* p. 4.

III. MCDONOUGH'S SUIT IS TIMELY UNDER THE CONTINUING VIOLATION DOCTRINE.

This Court has repeatedly applied the continuing violation doctrine to hold that a limitations period begins when a legal violation ends. *See* Pet. Br. 44-45. Here, McDonough alleges that Smith violated his constitutional rights by initiating and maintaining criminal proceedings against him on the basis of fabricated evidence. *See id.* at 23. In other words, the existence of the criminal proceedings was itself a wrong. *See Whelan* v. *Abell*, 953 F.2d 663, 673 (D.C. Cir. 1992) (Silberman, J., joined by Ginsburg, J.). Because Smith's violation of McDonough's constitutional rights continued until his acquittal, the statute of limitations did not begin to run until that point, rendering his suit timely. Pet. Br. 44-50. Smith's arguments to the contrary lack merit.

First, Smith suggests that the Court rejected the continuing violation doctrine in *Wallace*. *See* Resp. Br. 32-33. That is incorrect. *Manuel I* makes clear that the application of that doctrine to Section 1983 suits has not yet been addressed by this Court. *See* 137 S. Ct. at 921-922 & n.10. If anything, *Wallace* supports the continuing violation doctrine: The

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malicious prosecution, a criminal defendant's claim should not accrue under the "standard" rule until criminal proceedings terminate.

Court held that the statute of limitations for false arrest begins to run when the false arrest *ends*, not when it begins, suggesting that false arrest is a kind of continuing wrong. *See* 549 U.S. at 389-391. Of course, the fact that damages may continue to mount after a wrong occurs does not render the wrong continuous. *See id.* But here the underlying *wrong* was continuous. *See Manuel* v. *City of Joliet*, 903 F.3d 667, 669 (7th Cir. 2018) ("*Manuel II*"); *Whelan*, 953 F.2d at 673.

Second, Smith asserts that even if the continuing violation doctrine applies to Section 1983 claims like this one, McDonough's claim is untimely because he failed to allege "at least one timely instance of culpable conduct" within the limitations period. Resp. Br. 34. That is incorrect. Smith deprived McDonough of liberty by initiating and maintaining criminal proceedings against him on the basis of fabricated evidence. *See* Pet. Br. 23. That unlawful deprivation of liberty extended through jury deliberations, which Smith acknowledges occurred within the three-year limitations period. *See* Resp. Br. 37-38. Under the continuing violation doctrine, McDonough's Section 1983 claim is timely.

Smith, moreover, agrees that where a criminal defendant alleges that he has been convicted as a result of fabricated evidence, his "trial must be evaluated as a whole," and his Section 1983 claim does "not accrue until judgment [is] entered." *Id.* at 37. Smith does not explain why the wrongful initiation and maintenance of criminal proceedings based on fabricated evidence should be "evaluated as a whole" only if those proceedings lead to a conviction rather than an acquittal. The same approach should

apply where the criminal defendant has suffered a liberty deprivation as a result of fabricated evidence. The Court should hold that under the continuing violation doctrine, the statute of limitations begins to run when the constitutional violation ends, rendering McDonough's suit timely.

IV. SMITH'S ARGUMENTS TO THE CONTRARY FAIL.

A. McDonough Has Identified The Constitutional Right At Issue.

Smith also offers a grab-bag of other forfeited and meritless arguments.

First, Smith faults McDonough for failing to "identify the specific constitutional right at issue." Resp. Br. 1 (internal quotation marks omitted); *see also* States Amicus Br. 11. That is plainly untrue.

McDonough has repeatedly identified the constitutional rights at issue. In the District Court, on appeal to the Second Circuit, and before this Court, he has alleged not that his rights were violated under "some[]" unidentified provision of the Constitution, Resp. Br. 13-14 (internal quotation marks omitted), but that his rights were violated under the Fourth Amendment and Due Process Clause. *See* Pet. Br. 12, 41-43; JA32; JA46-47, ¶ 19; JA251-253, ¶¶ 1209-1213. Nor is there any ironclad rule that plaintiffs must choose a single provision of the Constitution.[8] Many claims "implicate more than one of

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[8] In any event, the Fourth Amendment is incorporated against the States by the Due Process Clause of the Fourteenth Amendment. *See Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961). In

the Constitution's commands." *Soldal* v. *Cook Cty.*, 506 U.S. 56, 70 (1992). Nor is it essential for this Court to decide whether the fabrication of evidence violates *both* the Fourth Amendment and the Due Process Clause. *See* Pet. Br. 42-43; U.S. Br. 13. The statute of limitations for the violation of both amendments begins to run at the same time. Pet. Br. 39-44.

Smith disagrees in large part because, in his view, there is a sharp divide between the Fourth Amendment and Due Process Clause, such that McDonough has two separate constitutional claims: One, under the Fourth Amendment, for the deprivation of his liberty prior to the start of trial; and one, under the Due Process Clause, for the deprivation of his liberty after the start of trial. Resp. Br. 2, 10. But there is "no principled reason to draw that line." *Manuel I*, 137 S. Ct. at 920 n.8.[9]

There is no textual or doctrinal basis to say that a person cannot be deprived of liberty in violation of due process before a criminal trial begins. As the United States explains, the "constitutional right at issue in this case naturally sounds in due process." U.S. Br. 7. It is conceded that McDonough was deprived of liberty before trial. Pet. App. 10a. And the "Due Process Clause * * * provides protection for convicted prisoners and pretrial detainees alike." *Bell* v. *Wolfish*, 441 U.S. 520, 554 (1979). Courts have thus consistently found due process violations

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that sense, McDonough is alleging the violation of a single constitutional provision.

[9] Nor has Smith ever raised this distinction until his merits brief in this Court, forfeiting the argument.

for events before trial. *See, e.g.*, *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2473 (2015); *Klen* v. *City of Loveland*, 661 F.3d 498, 516 (10th Cir. 2011).

Similarly, the fact that "[l]egal process has gone forward" does not "extinguish [a] detainee's Fourth Amendment claim." *Manuel I*, 137 S. Ct. at 918-919. The Fourth Amendment regulates pre-conviction legal process, "[w]hatever its precise form." *Id.* at 920 n.8. A pre-trial seizure can last through trial and ceases at "*conviction*." *Id.* (emphasis added); *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring) (defendant remains "'seized' for trial, so long as he is bound to appear in court"). The Fourth Amendment does not suddenly vanish the moment a trial commences.

Second, Smith contends that introducing fabricated evidence at trial violates only *substantive* due process, and therefore McDonough's Section 1983 claim must accrue immediately at that point. Resp. Br. 23-25. Once again, this argument was never raised below and is thus forfeited. Putting that aside, using fabricated evidence in judicial proceedings is a quintessential corruption of the process due to a criminal defendant. *See Albright*, 510 U.S. at 273 n.6 (plurality op.). As the First Circuit stated, "we are unsure what due process entails if not protection against deliberate framing under color of official sanction." *Limone* v. *Condon*, 372 F.3d 39, 45 (1st Cir. 2004); *see Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (per curiam). Further, even if Smith is correct that McDonough's due process claim should be labeled "substantive" rather than "procedural," the limitations rule would be the same. Malicious prosecution is still the most analogous tort at common

law, *Preiser* and *Heck* would still apply, and the due process violation continued until McDonough's acquittal.

Smith also asserts that there was no due process violation because McDonough "was acquitted at trial," and thus "the trial proceedings did not deprive [him] of liberty." Resp. Br. 25. That argument crumbles on minimal scrutiny: McDonough was deprived of liberty by *being subject to criminal charges*, whether or not he was acquitted. Numerous courts of appeals, recognizing that common-sense reality, have allowed due process claims after acquittal. *See Black*, 835 F.3d at 371 (collecting cases). Indeed, there was "no dispute" below "that McDonough suffered a liberty deprivation * * * when he was arrested *and stood trial*." Pet. App. 10a (emphasis added). Smith cannot now retract that concession. *See United States* v. *Galletti*, 541 U.S. 114, 120 n.2 (2004) ("Respondents have forfeited this argument by failing to raise it in the courts below.").

B. The District Court's Dismissal Of McDonough's Section 1983 Claim Alleging Malicious Prosecution Has No Bearing On His Section 1983 Claim Alleging Fabrication Of Evidence.

As noted, Smith does not contest that malicious prosecution is the proper analogy for McDonough's claim. If anything, he maintains that the analogy is too good: Because McDonough's Section 1983 claim alleging malicious prosecution was dismissed by the Second Circuit on the ground of absolute immunity, Smith contends, McDonough's fabrication of evidence claim should be dismissed too. *See* Resp. Br. 1-2. First of all, the question of absolute immunity is not

before the Court. Pet. Br. 24-25 n.7, U.S. Br. 29-30. Neither the District Court nor the Court of Appeals passed on the question, and Smith waived the issue by failing to raise it in his brief in opposition.

Second, this Court has already held that a prosecutor's act of fabricating evidence in his capacity as an investigator is not shielded by absolute immunity. *See Hartman* v. *Moore*, 547 U.S. 250, 262 n.8 (2006); *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 276 (1993). And the Second Circuit has indicated that absolute immunity would not shield a prosecutor who "fabricate[s] evidence in his investigative role" when it is "reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that [the plaintiff] would be indicted and arrested." *Zahrey*, 221 F.3d at 353-354. Justice Thomas has said that the Second Circuit's approach to prosecutorial immunity is "likely correct." *Michaels* v. *McGrath*, 531 U.S. 1118 (2001) (Thomas, J., dissenting from denial of certiorari). And the mere fact that McDonough's Section 1983 claim is *analogous* to malicious prosecution does not mean the immunity analysis would be the same. *See Buckley*, 509 U.S. at 274 n.5 (noting "there is no common-law tradition of immunity" for fabrication).[10]

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[10] Counts I and II of the Complaint are independent bases for relief, and do not rise and fall together. Indeed, a complaint is "sufficient" if "*any* one" of its "alternative statements" is "sufficient." Fed. R. Civ. P. 8(d)(2) (emphasis added).

V. PRACTICAL AND POLICY CONCERNS STRONGLY MILITATE IN FAVOR OF STARTING THE LIMITATIONS PERIOD AT FAVORABLE TERMINATION.

The Second Circuit's limitations rule is bad policy. Forcing criminal defendants to file civil suits while criminal cases are pending will drain resources, threaten disclosure of legal strategies, and undermine the "Fifth Amendment right against self-incrimination." U.S. Br. 23. Moreover, civil plaintiffs would face doctrinal obstacles under *Preiser* and *Heck* to bringing suit, as well as practical obstacles to securing counsel before their criminal cases conclude. Allowing the statute of limitations to run—and even expire—while those obstacles are in place would be "irrational, arbitrary and unjust." Innocence Network Amicus Br. 15; *see* Criminal Defense Organizations et al. Amicus Br. 23-24. Further, criminal defendants could use a civil suit to "chill testimony in the criminal action" or "obtain from the prosecutor discovery not available in the pending criminal proceeding." U.S. Br. 22 (internal quotation marks omitted).

None of Smith's three contrary policy arguments holds water. *First*, Smith asserts that this Court should not adopt a rule that leaves public officials "unsure" when a claim accrues. Resp. Br. 39. But a rule that depends on what a criminal defendant knew or should have known will not make officials any more sure of "the precise moment when the statute of limitations [begins] to run." U.S. Br. 27. Indeed, determining the relevant accrual date under the Second Circuit's rule will require "[i]ntrusive" and time-consuming discovery. CACL Amicus Br.

17. Smith also raises the possibility of delay as a criminal case "wends its way through the courts" before favorable termination. Resp. Br. 39. But this Court adopted that very rule in *Heck*. And, again, the Second Circuit's discovery rule could lead to equally long delays.

Second, Smith argues that the Second Circuit's limitations rule should be affirmed because "favorable termination" can be difficult to determine. Resp. Br. 40. But in the mine run of cases, the rule will be clear: Each party will be able to "determine[ ]" when the limitations period begins simply by "referring to the docket in the criminal case." CACL Amicus Br. 17. McDonough's case is typical: It favorably terminated the day he was acquitted.

Relatedly, Smith asserts that the favorable termination rule prejudices criminal defendants by offering prosecutors "a powerful incentive to ensure that the proceedings do not terminate favorably." Resp. Br. 42. Smith has it backwards. The more significant problem—confirmed by amici actually representing the interests of criminal defendants—is that forcing defendants to file civil suits while criminal charges are still pending would "imperil the possibility of a favorable plea agreement" or, even worse, "cause the prosecutor to revoke the plea offer entirely, add charges or enhancements, or seek a harsher sentence upon conviction." CACL Amicus Br. 13; *see* Criminal Defense Organizations et al. Amicus Br. 11.

Third, Smith asserts that problems of parallel litigation and conflicting judgments can be dealt with through the power "to stay the civil action." Resp. Br. 40 (quoting *Wallace*, 549 U.S. at 393-394). As the United States has noted, however, stays are not

guaranteed: The decision will "remain in the discretion of the district court." U.S. Br. 23 n.6. And criminal defendants will still have to "set out [their] theory of fabrication in a timely filed complaint" and devote significant time and attention to the stay litigation. *Id.* Even if a stay is granted, "the litigation over a stay could itself distract the prosecution and defense from the more pressing criminal proceeding." *Id.* A regime of discretionary stays will also needlessly burden federal courts. *See* Federal Courts Scholars Amicus Br. 31-32. There is no good reason to "clog federal dockets with dormant constitutional suits" that "will languish for years," and this Court should decline to do so. *Id.*; *see also* Criminal Defense Organizations et al. Amicus Br. 12; Cause of Action Institute Amicus Br. 13.

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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No. 18-485

In the Supreme Court of the United States

EDWARD G. MCDONOUGH, PETITIONER

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the statute of limitations on a claim for damages based on the alleged use of fabricated evidence to institute criminal proceedings, brought under 42 U.S.C. 1983, begins to run when the defendant discovers that fabricated evidence has been introduced in the criminal proceedings or when those proceedings are terminated in the defendant's favor.

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INTEREST OF THE UNITED STATES

The question presented in this case is when the statute of limitations begins to run on a claim against local officials under 42 U.S.C. 1983 based on the alleged use of fabricated evidence to institute criminal proceedings. The courts of appeals generally apply the same accrual rules for constitutional tort claims against state officers under Section 1983 to claims against federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Ruff* v. *Runyon*, 258 F.3d 498, 502 (6th Cir. 2001) (collecting cases). The United States has a substantial interest in the circumstances in which federal officers may be held liable for damages in civil actions for alleged violations of constitutional rights, as well as in the procedures available for safeguarding those rights.

STATEMENT

1. In 2009, petitioner Edward McDonough was serving as a commissioner of the Board of Elections for Rensselaer County, New York. Pet. App. 4a. This case concerns an alleged scheme by respondent Youel Smith and others to falsely accuse petitioner of participating in absentee-ballot fraud during the 2009 primary elections in Troy, New York, a city within Rensselaer County.

According to petitioner, several individuals associated with the Democratic and Working Families parties in Troy attempted to affect the outcome of the 2009 Working Family Party primary election in Troy by forging signatures and providing false information on dozens of absentee-ballot applications, and then falsely voting with the fraudulently obtained absentee ballots. Pet. App. 4a, 25a-27a. As commissioner, petitioner approved the forged applications, but he claims not to have known that they were forged. *Id.* at 4a-5a.

Upon the fraud's discovery, the district attorney for Rensselaer County disqualified his office from the investigation and any subsequent prosecution based on his personal connections to suspected participants in the fraud. Pet. App. 5a, 28a-29a. After the Rensselaer County Court appointed respondent as special prosecutor for any criminal action related to the fraud, petitioner alleges that respondent and several co-defendants engaged in a scheme to frame petitioner for the fraud. *Id.* at 5a, 28a-41a.

Among other things, petitioner alleges that respondent presented to a grand jury, and then to two petit juries, false testimony, forged voter affidavits, and faulty DNA evidence. Pet. App. 5a-6a, 35a-41a. On January 28, 2011, a grand jury charged petitioner with 38 counts

of felony forgery and 36 counts of felony criminal possession of a forged instrument, in violation of New York law. *Id.* at 5a, 36a, 40a. The first trial against petitioner ended in a mistrial. *Id.* at 5a-6a. A second trial ended in an acquittal on December 21, 2012. *Id.* at 6a, 40a-41a.

2. On December 18, 2015, petitioner filed this action under 42 U.S.C. 1983, claiming that respondent and several co-defendants had violated his constitutional rights "not to be deprived of liberty as a result of fabrication of evidence" and "not to be prosecuted maliciously without probable cause." Compl. Counts I, II (capitalization altered); see *id.* ¶¶ 1209-1218. Petitioner asserted both claims under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution. *Id.* ¶¶ 1210, 1215. As a result of the defendants' conduct, petitioner alleged that he was "deprived of his liberty," *id.* ¶ 1198; "likely will suffer * * * injury to his character and good reputation; great mental anguish and pain, and irreparable injury in his profession," *id.* ¶ 1205; and "sustained exorbitant criminal defense attorney fees and costs," *id.* ¶ 1206. He requested $6 million in compensatory damages, $2 million in punitive damages, and attorneys' fees and costs. *Id.* at 173-174.

a. In September 2016, the district court dismissed petitioner's first claim—the "fabrication of evidence claim," Pet. App. 47a—as untimely. *Id.* at 20a-84a. The court observed that a Section 1983 claim is subject to the statute of limitations applicable to personal-injury claims in the State in which the federal court sits, which in New York is three years. Pet. App. 47a (citing N.Y. C.P.L.R. 214(5) (McKinney 2003)). The court reasoned that "fabrication of evidence claims accrue," and the statute of limitations begins to run, "when the plaintiff learns, or should have learned, that the evidence was

fabricated." *Id.* at 48a. And it determined that petitioner knew or should have known of all of the fabricated evidence at some point more than three years before he filed his complaint in December 2015. *Id.* at 52a-53a.

The district court declined to dismiss petitioner's second claim—the "malicious prosecution claim." Pet. App. 48a; see *id.* at 47a-48a. Unlike a "fabrication of evidence claim," the court reasoned that a malicious-prosecution claim "'does not accrue until the criminal proceedings have terminated in the plaintiff's favor.'" *Id.* at 47a (quoting *Heck* v. *Humphrey*, 512 U.S. 477, 489 (1994)) (brackets omitted). Because petitioner was not acquitted of the charges until December 21, 2012, the court concluded that he timely filed his malicious-prosecution claim on December 18, 2015. *Id.* at 48a.

b. Two months later, the district court dismissed the malicious-prosecution claim against respondent on absolute-immunity grounds. Pet. App. 85a-137a. The court determined that petitioner had adequately pleaded a malicious-prosecution claim under the Fourth Amendment based on respondent's use of fabricated evidence to initiate criminal proceedings without probable cause. *Id.* at 95a-106a. But it concluded that respondent was entitled to "absolute prosecutorial immunity" from that claim. Pet. App. 106a. The court explained that "[p]rosecutors are entitled to absolute immunity when they engage in activities 'intimately associated with the judicial phase of the criminal process.'" *Ibid.* (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976)). It reasoned that, "because the initiation and pursuit of a criminal prosecution are quintessential prosecutorial functions, the prosecutor has absolute immunity for the initiation and conduct of a prosecution unless he proceeds in the clear absence of all jurisdiction." *Id.* at

109a-110a (brackets, citation, and internal quotation marks omitted). And the court found no basis to conclude that respondent had acted in the clear absence of jurisdiction. *Id.* at 110a-111a.

Following the dismissal of all claims against respondent, the district court entered judgment as to respondent under Federal Rule of Civil Procedure 54(b) and certified its decisions dismissing the claims against him for interlocutory appeal. Pet. App. 4a.

3. The court of appeals affirmed the district court's orders. Pet. App. 1a-19a.

The court of appeals described petitioner's claims against respondent as (1) a due-process claim based on fabricated evidence and (2) a malicious-prosecution claim. Pet. App. 3a. As to the due-process claim, the court reasoned that "[u]nder the Fifth and Fourteenth Amendments' Due Process Clauses, individuals have 'the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer.'" *Id.* at 10a (citation and internal quotation marks omitted). It stated that a fabrication-of-evidence claim accrues "(1) when a plaintiff learns of the fabrication and it is used against him, and (2) his liberty has been deprived in some way." *Ibid.* For petitioner, the court reasoned, that was "at the latest, by the end of his first trial, after all of the prosecution's evidence had been presented." *Id.* at 13a-14a.

The court of appeals rejected the reasoning of other circuits that "due process fabrication" claims accrue "only after criminal proceedings have terminated because [they] are analogous to claims of malicious prosecution, which require termination of the criminal proceeding in the defendant's favor before suit may be brought." Pet. App. 12a. In the Second Circuit's view,

"the nature of [petitioner]'s due process claim is different from a malicious prosecution claim." *Id.* at 8a. The court concluded that "[b]ecause the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the cause of action accrues." *Id.* at 13a.

The court of appeals likewise rejected petitioner's argument that his due-process claim is timely because his prosecution represented a "continuing violation" as long as the proceedings continued. Pet. App. 16a (citation omitted). "Characterizing defendants' separate wrongful acts as having been committed in furtherance of a conspiracy or as a single series of interlocking events," it reasoned, "does not postpone accrual of claims based on individual wrongful acts." *Ibid.* (citation omitted).

The court of appeals also affirmed the dismissal of the malicious-prosecution claim. Pet. App. 17a-18a. The court explained that prosecutors "are entitled to absolute immunity when acting as advocates for the state, such as initiating prosecutions or at trial." *Id.* at 18a. Because petitioner's malicious-prosecution claim "relates only to [respondent]'s prosecutorial function," the court held that absolute immunity applied. *Ibid.*

SUMMARY OF ARGUMENT

The statute of limitations for a Section 1983 claim seeking damages for the initiation of criminal proceedings based on fabricated evidence does not begin to run until those proceedings are terminated in the criminal defendant's favor.

I. Section 1983 creates a species of tort liability for the vindication of federal constitutional rights, informed by general common-law principles. Under those principles, a claim generally accrues, and the limitations period begins, when the plaintiff has a complete and present cause of action. Thus, to determine when the statute of limitations begins to run on a Section 1983 claim, a court generally must determine the elements of the claim. Under this Court's precedents, that requires (1) identifying the specific constitutional right at issue, (2) determining the common-law cause of action that provides the closest analogy to the constitutional claim, and (3) deciding which of the elements of that common-law cause of action are consistent with "the values and purposes of the constitutional right." *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 921 (2017).

II. Applying that analysis, the statute of limitations on petitioner's Section 1983 claim did not begin to run until he was acquitted of the criminal charges against him. The constitutional right at issue in this case naturally sounds in due process. It is well established that the knowing use of fabricated evidence to obtain a conviction violates due process where the fabricated evidence is material to the verdict. Although petitioner was acquitted, the courts of appeals have generally held that the knowing use of fabricated evidence may violate due process even absent a conviction, where the defendant can show that the evidence was used to bring about some other deprivation of liberty, as petitioner alleges it was here through the initiation of criminal proceedings.

The most analogous common-law tort to such a claim is malicious prosecution, the gravamen of which is that the plaintiff was improperly subjected to criminal pros-

ecution to the detriment of his liberty, property, or reputation. One element of a common-law malicious-prosecution claim is that the allegedly unfounded prosecution was eventually terminated in the tort plaintiff's favor. As an element of petitioner's Section 1983 claim, a favorable-termination requirement would serve all the same interests it does at common law. It would be consistent with the due-process principles underlying petitioner's claim, and it would reinforce broader Section 1983 principles.

For those reasons, a Section 1983 plaintiff seeking damages for the initiation of criminal proceedings based on fabricated evidence should not have a complete and present cause of action until the criminal proceedings are terminated in his favor. Because petitioner filed his Section 1983 claim within three years of the favorable termination of the criminal proceedings against him, his claim is timely. The court of appeals' judgment therefore should be reversed.

III. On remand, the district court should likely dismiss petitioner's Section 1983 claim against respondent on the ground of absolute immunity. Section 1983 incorporates certain common-law immunities that were well established when it was enacted in 1871. And "at common law prosecutors were immune from suits for malicious prosecution and for defamation," including for "the knowing use of false testimony before the grand jury and at trial." *Burns* v. *Reed*, 500 U.S. 478, 485 (1991). As petitioner's argument in this Court makes clear, his claim against respondent is based on such conduct.

ARGUMENT

THE STATUTE OF LIMITATIONS FOR A SECTION 1983 CLAIM SEEKING DAMAGES FOR THE INITIATION OF CRIMINAL PROCEEDINGS BASED ON FABRICATED EVIDENCE DOES NOT BEGIN TO RUN UNTIL THOSE PROCEEDINGS ARE TERMINATED IN THE CRIMINAL DEFENDANT'S FAVOR

The fabrication and use of evidence in a criminal proceeding is reprehensible conduct. The United States can bring criminal charges against a prosecutor who willfully violates an individual's constitutional rights through the use of fabricated evidence, see 18 U.S.C. 242, or conspires with a witness or police officer to do so, see 18 U.S.C. 241. This case concerns when an individual prosecuted on the basis of such evidence may bring a claim for damages under 42 U.S.C. 1983—specifically, when such a claim must be filed to be timely.

The parties agree that New York's three-year statute of limitations for personal-injury claims provides the relevant limitations period. Pet. App. 9a; see N.Y. C.P.L.R. 214(5) (McKinney 2003). The question before the Court is when that period began to run. Petitioner offers three avenues for answering that question in his favor: (1) adopting what he calls the distinctive accrual rule of malicious prosecution for his fabrication-of-evidence claim, Pet. Br. 19-30; (2) defining when a Section 1983 plaintiff in these circumstances has a complete and present cause of action and applying the standard accrual rule, *id.* at 31-44; or (3) holding that any constitutional violation continued throughout the criminal proceedings, such that the limitations period did not begin until the proceedings ended, even if petitioner had a complete cause of action before that time, *id.* at 44-50.

In the government's view, the second of those options is the correct one. There is no distinctive accrual rule for claims of malicious prosecution at common law. But because the plaintiff must show, as an element of his malicious-prosecution claim, that the criminal proceedings terminated in his favor, the statute of limitations cannot begin to run on such a claim until the criminal proceedings are over. For all the reasons that the common law adopted a favorable-termination requirement for malicious-prosecution claims, the Court should adopt the same requirement for petitioner's closely analogous claim under Section 1983 that a prosecutor used fabricated evidence to initiate charges against him. See pp. 20-29, *infra*. Because petitioner filed his Section 1983 claim within three years of the favorable termination of criminal proceedings against him, the Court need not address the difficult questions that would arise under petitioner's alternative continuing-violations theory. Although the judgment below should be reversed, on remand, petitioner's claim is likely barred by prosecutorial immunity.

I. The Statute Of Limitations On A Section 1983 Claim Seeking Damages For The Initiation Of Criminal Proceedings Based On Fabricated Evidence Begins To Run When The Plaintiff Has A Complete And Present Cause Of Action

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. 1983. As this Court

has explained, the statute "creates a species of tort liability" for vindicating federal constitutional rights. *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994) (citation omitted). For certain aspects of that cause of action, such as the statute of limitations, federal law "looks to the law of the State in which the cause of action arose." *Wallace* v. *Kato*, 549 U.S. 384, 387 (2007); see 42 U.S.C. 1988(a). For others, the federal rules "conform[] in general to common-law tort principles." *Wallace*, 549 U.S. at 388.

"[T]he accrual date of a [Section] 1983 cause of action" is one of those aspects governed by general common-law principles without "reference to state law." *Wallace*, 549 U.S. at 388. Under those principles, "it is 'the standard rule that [accrual occurs] when the plaintiff has "a complete and present cause of action,"' that is, when 'the plaintiff can file suit and obtain relief.'" *Ibid.* (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. Of Cal., Inc.*, 522 U.S. 192, 201) (1997) (citation omitted) (brackets in original). To determine when a Section 1983 claim accrues, a court therefore generally must determine when the elements of the cause of action will be met. "At that point—and not before—he can file a suit." *Green* v. *Brennan*, 136 S. Ct. 1769, 1777 (2016). "So only at that point—and not before—does he have a 'complete and present' cause of action." *Ibid.*

The Court's precedents provide a clear roadmap for that determination. The "threshold" task is to "'identify the specific constitutional right' at issue." *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920 (2017) (citation omitted); see *Graham* v. *Connor*, 490 U.S. 386, 394 (1989). After all, Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights

elsewhere conferred." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). Only "[a]fter pinpointing" the right at issue, may a court "determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel*, 137 S. Ct. at 920.

To then determine the elements of the Section 1983 claim, courts again "look * * * to the common law of torts." *Manuel*, 137 S. Ct. at 920. As the Court has explained, "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights." *Carey* v. *Piphus*, 435 U.S. 247, 257 (1978); see *Heck*, 512 U.S. at 483; *Wilson* v. *Garcia*, 471 U.S. 261, 277 (1985). Those pre-existing rules, "defining the elements of damages and the prerequisites for their recovery," provide valuable guidance in defining the contours of constitutional torts under Section 1983. *Carey*, 435 U.S. at 257-258.

In particular, the Court's precedents require (1) identifying the common-law cause of action that provides "the closest analogy" to the type of constitutional claim at issue, *Heck*, 512 U.S. at 484, and (2) incorporating the elements (or other rules) of that common-law cause of action that are consistent with "the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921; see, *e.g.*, *Wallace*, 549 U.S. at 388-390 (incorporating the accrual rule for false imprisonment); *Heck*, 512 U.S. at 483-487 (incorporating the favorable-termination element from malicious prosecution).

II. A Section 1983 Plaintiff Seeking Damages For The Initiation Of Criminal Proceedings Based On Fabricated Evidence Does Not Have A Complete And Present Cause Of Action Until Those Proceedings Terminate In His Favor

Under this Court's analysis that looks to the closest analogous tort at common law, a Section 1983 plaintiff seeking damages for the initiation of criminal proceedings based on fabricated evidence does not have a complete and present cause of action until those proceedings are terminated in his favor.

A. Petitioner's Section 1983 Claim Asserts A Constitutional Right To Be Free From Criminal Prosecution On The Basis Of Fabricated Evidence

Before determining the proper elements of a constitutional tort, "it is necessary to isolate the precise constitutional violation" that has been alleged. *Baker*, 443 U.S. at 140; see *Manuel*, 137 S. Ct. at 920. In the Section 1983 claim at issue here, petitioner alleges that respondent and respondent's co-defendants violated his "constitutional right not to be deprived of liberty as a result of fabrication of evidence." Compl. 171 (capitalization altered). Petitioner's complaint lists the Fourth, Fifth, Sixth, and Fourteenth Amendments as potential bases for that right. *Id.* ¶ 1210. The government agrees with petitioner (Pet. Br. 42-43) that the Court does not need to determine the particular source of the right, because the contours of the constitutional right will not vary in any respect relevant here depending on where it is housed. To the extent the Court addresses the constitutional question, however, petitioner's claim most naturally sounds in due process.

1. It is well established that "a conviction obtained through use of false evidence, known to be such by representatives of the State," violates the Due Process

Clause of the Fourteenth Amendment. *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); see *Miller* v. *Pate*, 386 U.S. 1, 7 (1967) ("[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."); *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942) (recognizing a due-process violation where "perjured testimony" is "knowingly used by the State authorities to obtain [a] conviction"); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (due process "cannot be deemed to be satisfied * * * if a State has contrived a conviction through * * * a deliberate deception of court and jury").

Although petitioner does not allege that he was *convicted* on the basis of fabricated evidence—he was in fact acquitted of the charges, see p. 3, *supra*—the courts of appeals have generally held that the knowing use of fabricated evidence may violate due process even absent a conviction, where the defendant can show that she was "deprive[d] * * * of her liberty in some [other] way." *Whitlock* v. *Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012), cert. denied, 568 U.S. 1143 (2013); see *Black* v. *Montgomery Cnty.*, 835 F.3d 358, 371 (3d Cir. 2016) ("[A]n acquitted criminal defendant may have a stand-alone fabricated evidence claim against state actors under the due process clause of the Fourteenth Amendment if there is a reasonable likelihood that, absent that fabricated evidence, the defendant would not have been criminally charged."), cert. denied, 137 S. Ct. 2093 (2017); *Zahrey* v. *Coffey*, 221 F.3d 342, 348 (2d Cir. 2000) (holding that depriving someone of their liberty on the basis of fabricated evidence is a "classic constitutional violation: the deprivation of his liberty without due process of law").

Petitioner relies on that authority in asserting his Section 1983 claim. See Compl. ¶¶ 170-171 (citing *Zahrey*, *supra*). The parties do "no[t] dispute" that petitioner "suffered a liberty deprivation" as a result of the criminal proceedings. Pet. App. 10a; see Compl. ¶ 1199 (alleging that, upon his arraignment, petitioner was required to "remain within the jurisdiction of the Court and surrender any passport"). And both the district court and the court of appeals analyzed the claim principally in those terms. See Pet. App. 8a-17a (discussing the timeliness of petitioner's "due process claim"); *id.* at 49a (analyzing the timeliness of petitioner's claim as arising "under the due process[] clauses of the Fifth and Fourteenth Amendments"). As the courts below recognized, and petitioner implicitly acknowledges in his complaint, his claim that local officials unjustly deprived him of liberty through the use of fabricated evidence most naturally arises under the Due Process Clause of the Fourteenth Amendment.

2. Petitioner also suggests (Br. 42) that his fabrication-of-evidence claim could arise under the Fourth Amendment or even the Sixth Amendment. The Fourth Amendment is an unlikely home for petitioner's asserted constitutional right. The "Fourth Amendment does not speak of unreasonable 'prosecutions,' and instead refers only to unreasonable 'searches and seizures.'" *Britton* v. *Maloney*, 196 F.3d 24, 28 (1st Cir. 1999) (citation omitted), cert. denied, 530 U.S. 1204 (2000). Although this Court has recognized that the Fourth Amendment "establishes the minimum constitutional 'standards and procedures' not just for arrest but also for ensuing 'detention,'" *Manuel*, 137 S. Ct. at 917 (citation omitted), being subjected to the judicial process is not naturally considered a "seizure" within the

meaning of the Fourth Amendment. See *Brower* v. *County of Inyo*, 489 U.S. 593, 596 (1989) ("Violation of the Fourth Amendment requires an intentional acquisition of physical control.").[1]

As to the Sixth Amendment, petitioner states that the "Second Circuit has suggested that fabrication of evidence could arise under the Sixth Amendment, which guarantees a fair trial before an impartial jury." Pet. Br. 42 n.13 (citing *Morse* v. *Fusto*, 804 F.3d 538, 547 n.7 (2d Cir. 2015), cert. denied, 137 S. Ct. 126 (2016)). The Sixth Amendment guarantees "[i]n all criminal prosecutions" "the right to a speedy and public trial, by an impartial jury." U.S. Const. Amend. VI. The suggestion, however, that it also protects the right not to be subject to criminal prosecution based on fabricated evidence seems to stem from mistaken dicta in a Second Circuit decision interpreting the Due Process Clause.[2] The

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[1] In *Albright* v. *Oliver*, 510 U.S. 266 (1994), the Court declined to recognize a freestanding substantive due-process right "to be free from criminal prosecution except upon probable cause," but "express[ed] no view" as to whether the plaintiff might have a Fourth Amendment claim. *Id.* at 268, 275 (plurality opinion). In her concurring opinion, Justice Ginsburg reasoned that restrictions imposed to secure a defendant's court attendance during trial, such as travel restrictions, may constitute a continuing "seizure." *Id.* at 277-278.

[2] In *Morse*, the Second Circuit stated that it had been "'inconsistent as to whether' fabrication of evidence claims 'arise under the Sixth Amendment * * * or under the due process clauses of the Fifth and Fourteenth Amendments.'" 804 F.3d at 547 n.7 (citation and brackets omitted). But the decisions it cited were both grounded in due process. See *Zahrey*, 221 F.3d at 348; *Ricciuti* v. *N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (discussing "the protection[s] of due process of the law and fundamental justice") (citing *Mooney*, *supra*).

promise of a "fair trial in a fair tribunal is a basic requirement of due process." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 551 (1976).

B. Malicious Prosecution Is The Most Analogous Common-Law Tort To Petitioner's Constitutional Claim

Having identified the constitutional right at issue, the Court next "must determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel*, 137 S. Ct. at 920. The Court has looked to common-law torts for valuable guidance in making that determination. See, *e.g.*, *Hartman* v. *Moore*, 547 U.S. 250, 258 (2006); *Wallace*, 549 U.S. at 388-389; *Heck*, 512 U.S. at 483-484; *Carey*, 435 U.S. at 257-258. And while identifying the closest analogy to particular constitutional claims can sometimes present a difficult question, that is not so here.

1. At common law, a person who institutes criminal proceedings "against another from wrongful or improper motives, and without probable cause to sustain it," is liable for the tort of malicious prosecution. Martin L. Newell, *A Treatise on the Law of Malicious Prosecution* § 5, at 6 (1892); see Restatement (Second) of Torts § 653, at 406 (1977) (Restatement). The elements are generally described as (1) "[a] suit or proceeding has been instituted without any probable cause therefor"; (2) "[t]he motive in instituting [that proceeding] was malicious"; and (3) "[t]he prosecution has terminated in the acquittal or discharge of the accused." Thomas M. Cooley, *A Treatise on the Law of Torts* 181 (1880); see Newell § 8, at 10 (same); Restatement § 653, at 406 (combining first two elements); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 871 (5th ed. 1984) (dividing first element into two). The

"gravamen" of such a claim is that "the plaintiff has improperly been made the subject of legal process to his damage." 2 Simon Greenleaf, *A Treatise on the Law of Evidence* 498 (7th ed. 1858).

The common-law tort thus protects the defendant's interest in "freedom from unjustifiable and unreasonable litigation," as well as his interests in reputation, property, and liberty. 1 Fowler V. Harper et al., *Harper, James and Gray on Torts* § 4.2, at 457 (3d ed. 2006). Malicious prosecution is a "wrong to character or reputation," by virtue of the unfounded allegations; an injury "to property, on account of the necessary cost and expense of defending against unfounded demands or accusations"; and may include "an injury to the person, as connected with false imprisonment." 1 Francis Hilliard, *The Law of Torts or Private Wrongs* § 1, at 412 (1866) (emphasis omitted); see George W. Field, *A Treatise on the Law of Damages* § 685, at 543 (1876) ("[W]henever a person sustains damages to his reputation, life, limb, liberty, or property, by reason of a malicious prosecution, he may recover therefor.").

Petitioner alleges precisely that sort of wrong and seeks redress for exactly those types of harms. He alleges that respondent violated his constitutional rights by initiating unfounded criminal proceedings against him based on fabricated evidence. Compl. ¶ 1211. He seeks damages for the deprivation of his liberty during the proceedings, *id.* ¶¶ 1198-1199; for the costs of defending against such unjustified litigation, *id.* ¶ 1206; and for the reputational and professional harm he has suffered and expects to suffer because of the respondent's "malicious actions," *id.* ¶¶ 1205, 1207. In other words, he is seeking recovery for the harm to "his rep-

utation, life, limb, [and] property, by reason of a malicious prosecution" brought by respondent. Field § 685, at 543.[3]

2. The court of appeals rejected the analogy to malicious prosecution, but failed to identify any other analogous tort. See Pet. App. 12a-13a. The court observed that the "injury" in a fabrication-of-evidence claim "occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted." *Id.* at 13a. It reasoned that the "harm—and the due process violation—is in the *use* of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding." *Ibid.* It thus concluded that "the nature of [petitioner]'s due process claim is different from a malicious prosecution claim." *Id.* at 8a.

Contrary to the court's suggestion, however, the harm in a malicious prosecution is not in the eventual resolution of the criminal proceedings either. As discussed above, the harms redressed by the common-law tort stem from the *initiation* of the criminal proceedings. It is the malicious initiation of such proceedings that wrongfully deprives the defendant of his liberty, property, or reputation. Petitioner likewise seeks to recover for those same kinds of harms stemming from the

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[3] Whether all such damages are compensable in a Section 1983 action of this sort is a separate question not presented here. See *Carey*, 435 U.S. at 258-259 ("[T]he rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question."); *Siegert* v. *Gilley*, 500 U.S. 226, 233 (1991) ("[An] injury to reputation by itself [i]s not a 'liberty' interest protected under the Fourteenth Amendment.") (citation omitted).

same sort of violation. The court of appeals' focus on those harms therefore only underscores that malicious prosecution is plainly the most analogous common-law claim for a Section 1983 plaintiff who seeks damages for the use of fabricated evidence to initiate criminal proceedings against him.[4] That conclusion is only reinforced by the court of appeals' failure to identify any other analogous common-law claim.

C. The Court Should Adopt The Favorable-Termination Requirement As An Element Of The Constitutional Tort

1. Because the common-law tort of malicious prosecution is the most appropriate analogy, the Court must determine which of the tort's elements should be incorporated into petitioner's constitutional claim. Although Section 1983 is not "simply a federalized amalgamation of pre-existing common-law claims," *Rehberg* v. *Paulk*, 566 U.S. 356, 366 (2012), the Court has recognized that "[c]ommon-law principles are meant to guide * * * the definition of [Section] 1983 claims," *Manuel*, 137 S. Ct. at 921. The relevant question is whether the elements of the common-law cause of action are consistent with "the values and purposes of the constitutional right at issue." *Ibid.*

Petitioner argues (Br. 19-30) that the Court need not engage in that analysis. He contends (Br. 19) that, as in *Wallace*, the Court can simply borrow the accrual rule from the most analogous common-law tort without "delv[ing] into what the elements of [his] constitutional claim are." In *Wallace*, false imprisonment supplied the

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[4] A different analogy to the common-law tort of false imprisonment may apply to a claim seeking damages for an arrest based on fabricated evidence. See Pet. App. 13.

most analogous common-law tort to the plaintiff's Section 1983 claim. See 549 U.S. at 389. The Court explained that false imprisonment "is subject to a distinctive rule" that the "[l]imitations begin to run * * * when the alleged false imprisonment ends," *ibid.*, even though a false-imprisonment plaintiff has a complete cause of action "immediately upon his false arrest," *id.* at 390 n.3. And it determined that the same rule should apply to the constitutional tort. See *id.* at 391-392.

Petitioner observes (Br. 28-29) that "the statute of limitations for the tort of malicious prosecution does not begin to run until favorable termination." Unlike with false imprisonment, however, that is not by virtue of any "distinctive" limitations rule. Pet. Br. 29. Rather, it is because favorable termination is an element of a malicious-prosecution claim. As a practical matter, because the other elements of the claim concern the *initiation* of those same proceedings, see p. 17, *supra*, the favorable-termination element is always the last element to be met. As a result, the plaintiff does not have a complete and present cause of action until the criminal proceedings are terminated, at which point the statute of limitations begins to run under the standard accrual rule. If the Court incorporates a favorable-termination element into the constitutional tort at issue here, the same will be true of petitioner's Section 1983 claim. But unlike in *Wallace*, the Court cannot avoid considering the elements by adopting a "distinctive" malicious-prosecution accrual rule that does not exist at common law.

2. Turning to the elements, the Court should adopt a favorable-termination requirement for petitioner's Section 1983 claim. Indeed, all of the reasons for the requirement at common law apply equally here. It is

consistent with the constitutional values that petitioner's claim seeks to vindicate, and it reinforces broader Section 1983 principles.[5]

a. At the outset, a favorable-termination requirement would serve the same "ripeness" interest as in malicious-prosecution actions. Keeton § 119, at 874. At common law, the element ensures that a malicious-prosecution action is not "tried at a time when it might tend to chill testimony in the criminal action, when the issues may still be narrowed by the criminal process, and when the civil dispute might still be resolved by compromise or other nonjudicial measures if the criminal trial can but proceed to an end." *Ibid.*; see Dan B. Dobbs, *The Law of Torts* § 590 (2d ed. 2018). And it "avoids parallel litigation over the issues of probable cause and guilt." *Heck*, 512 U.S. at 484 (quoting 8 Stuart M. Speiser et al., *The American Law of Torts* § 28:5, at 24 (1991)).

A Section 1983 claim for damages based on the wrongful initiation of criminal proceedings, if permitted to proceed in parallel with the criminal case itself, could be similarly disruptive. The pending threat of damages may "chill testimony in the criminal action," Keeton § 119, at 874, undermining the truth-seeking function of the criminal proceeding. At the same time, the civil suit might be used to obtain from the prosecutor discovery not available in the pending criminal proceeding. See *Degen* v. *United States*, 517 U.S. 820, 825-826 (1996)

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[5] Because favorable termination would be an element of a damages action under Section 1983, rather than a limitation on the scope of the constitutional right, it would not affect the United States' ability to prosecute those who willfully violate individuals' constitutional rights. See 18 U.S.C. 241, 242.

(contrasting the "limited discovery" to which defendants are entitled in a criminal proceeding with the broader standards available in a civil suit). Conversely, the requirement on a defendant to timely bring such a suit during the pendency of criminal proceedings, in which the defendant must plead the basis for his fabrication claims and expose himself to the possibility of civil discovery, may undermine the criminal defendant's Fifth Amendment right against self-incrimination. A favorable-termination element would prevent these harms.[6]

b. A favorable-termination requirement also would promote interests of consistency and respect for the judicial process. As this Court recognized in *Heck*, as an element of malicious prosecution, the requirement "precludes the possibility of the claimant * * * succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." 512 U.S. at 484 (quoting Speiser § 28:5, at 24); see *Fisher* v. *Bristow*, (1779) 99 Eng. Rep. 140 (K.B.) 140 ("[O]therwise he might recover in the action,

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[6] To be sure, a district court could address some of these concerns by staying proceedings in the civil suit, while the criminal proceedings or a subsequent appeal or habeas proceeding continues. See *Heck*, 512 U.S. at 487 n.8. But even a stayed civil damages suit may affect the testimony in the pending criminal proceedings, and the possibility of a stay would not relieve the criminal defendant from the obligation to set out his theory of fabrication in a timely filed complaint. Moreover, whether to grant a stay would remain in the discretion of the district court, and the litigation over a stay could itself distract the prosecution and defense from the more pressing criminal proceeding.

and yet be afterwards convicted on the original prosecution."). It also prevents a criminal defendant from bringing a "collateral attack on [his] conviction through the vehicle of a civil suit." *Heck*, 512 U.S. at 484; see Dobbs § 590 ("If the accused was convicted, a malicious prosecution action should be impermissible because courts should not be permitted to collaterally attack the conviction.").

In *Heck*, the Court relied on the interests in consistent judgments and preventing collateral attacks on criminal judgments to incorporate the favorable-termination element into a constitutional tort seeking "to recover damages for allegedly unconstitutional conviction or imprisonment." 512 U.S. at 486; see *ibid.* ("[C]ivil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments."). The adoption of the element here would further those same interests and prevent a criminal defendant from using a Section 1983 claim to "collateral[ly] attack" his indictment or eventual conviction "through the vehicle of a civil suit." *Id.* at 484 (citation omitted); see *Kaley* v. *United States*, 571 U.S. 320, 328 (2014) ("The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime.").

c. In addition, a favorable-termination requirement would serve an important evidentiary purpose. At common law, the favorable-termination element of malicious prosecution exists in part "for what it shows about probable cause or guilt-in-fact" of the accused. Keeton § 119, at 874. A criminal prosecution that terminates in a final conviction undermines the plaintiff's claim that the prosecution was unfounded to begin with, and was initiated without probable cause. See Hilliard § 29, at

457; Melville M. Bigelow, *Elements of the Law of Torts* 72 (1878) ("[J]udgment against the party prosecuted would, it is deemed, show that the prosecutor had reasonable ground for his conduct."). Conversely, where a prosecution ends favorably to the accused, that resolution may serve as "evidence of the want of probable cause for the prosecution." *Whitfield* v. *Westbrook*, 40 Miss. 311, 317 (1866); see *Lunsford* v. *Dietrich*, 9 So. 308, 310 (Ala. 1891); Restatement §§ 663-665, at 429-433.

In the due-process context, this Court has explained that the knowing use of fabricated evidence to obtain a conviction violates due process only where there is a "reasonable likelihood" that the evidence "could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976); cf. *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999) ("[T]here is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."). Although petitioner's due-process claim is based on the deprivation of his liberty that resulted not from a conviction, but from the initiation of criminal proceedings, courts of appeals to recognize such a claim have properly required that the fabricated evidence was material to the charging decision. See *Black*, 835 F.3d at 371 (requiring "a reasonable likelihood that, absent that fabricated evidence, the defendant would not have been criminally charged"); *Morse*, 804 F.3d at 547 (finding that a prosecutor may be liable for harm caused by fabricated evidence that was "material to the grand jury's decision to indict").

Just as the termination of criminal proceedings in a manner favorable to the accused can provide support

for the plaintiff's allegation that the prosecution was initiated without probable cause, it also can indicate that the allegedly false evidence used to initiate charges was material to the charging decision. If a defendant is able to obtain an acquittal at trial when given the opportunity to rebut the fabricated evidence, that will tend to show that the evidence—which the prosecutor presented without rebuttal at the charging stage—was material to the grand jury's decision to indict. Conversely, if the fabricated grand jury evidence is not presented at trial, is excluded from evidence, or is rebutted, and a conviction is *still* obtained, that conviction will tend to show the fabricated evidence was likely not material to the charging decision. And where a defendant obtains a favorable termination on appeal or in habeas proceedings by challenging the introduction of fabricated evidence leading to a conviction as a violation of due process, such a reversal of the conviction will necessarily include a finding that the fabricated evidence was material to the petit jury, see *Agurs*, 427 U.S. at 103—and therefore will tend to suggest that it was material to the grand jury as well. As with its value in proving the presence or lack of probable cause, the termination of proceedings will not necessarily be dispositive proof of materiality. But its strong evidentiary value counsels in favor of the element's inclusion in the constitutional tort.

d. A favorable-termination requirement likewise would provide potential litigants and the courts with clear notice of the point at which "the plaintiff has 'a complete and present cause of action'" and when the limitations period begins to run. *Wallace*, 549 U.S. at 388 (citation omitted). A clear demarcation of that period will prevent costly disputes about the moment at which a criminal defendant became aware or should

have become aware of the use of fabricated evidence, which would be inevitable under the court of appeals' approach but are "foreign to the central purposes of [Section] 1983." *Wilson*, 471 U.S. at 272.

Notably, in this case, neither lower court determined the precise moment when the statute of limitations began to run on petitioner's claim, reasoning only that he learned (or should have learned) of respondent's use of fabricated evidence at some point more than three years before filing suit. See Pet. App. 13a-14a (concluding the petitioner must have learned of the evidence "at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial"); *id.* at 52a-53a (concluding only that it was "prior to December 18, 2012"). The lower courts were able to avoid pinpointing that date because petitioner did not bring suit until nearly three years after the end of his second criminal trial. But on the court of appeals' approach, there will be future cases in which the particular timing matters. Avoiding "useless litigation on [such] collateral matters" led the Court to adopt a clear rule for determining the appropriate limitations period to borrow from state law for Section 1983 claims in *Wilson*. 471 U.S. at 275. The same "federal interests" in "certainty[] and the minimization of unnecessary litigation" counsel in favor of adopting a favorable-termination element here. *Ibid.*

e. Finally, a favorable-termination element would be consistent with principles of federal-state comity. Petitioner indirectly invokes those principles when he contends (Br. 32-35) that this Court's decision in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), would independently prevent a defendant from seeking damages for the initiation of criminal proceedings prior to the favorable termination of those proceedings. In *Preiser*,

the Court held that the federal habeas statute provides "the exclusive remedy" in federal court for a prisoner who "attack[s] the validity of his confinement." *Id.* at 489. Petitioner argues that even a defendant released on personal recognizance is in "custody" for purposes of the federal habeas statute, such that habeas offers "the exclusive remedy for a state prisoner who challenges the fact or duration" of that custody. Pet. Br. 34 (citation omitted). According to petitioner, *Heck* "extended *Preiser* to a suit seeking monetary damages under Section 1983," like petitioner's suit, "where awarding damages would 'call into question the lawfulness'" of that custody. *Ibid.* (citation omitted).

The court of appeals rejected petitioner's argument, reading this Court's decision in *Heck* to apply "only when there exists a *conviction or sentence* that has not been invalidated" but would be put into question by the damages award. Pet. App. 16a (emphasis altered). Since petitioner was never convicted, the court of appeals reasoned that "the *Heck* rule" never applied to his Section 1983 claim. *Ibid.* (citation omitted). But regardless whether *Preiser*, as interpreted by *Heck*, would have barred petitioner's Section 1983 claim before the favorable termination of his criminal proceedings, the principles supporting that decision—namely, avoiding "unnecessary friction between the federal and state court systems" and "'a proper respect for state functions,'" *Preiser*, 411 U.S. at 490-491 (citation omitted)—also support requiring the favorable termination of state criminal proceedings before asking a federal court to consider a Section 1983 claim that would call those proceedings into question.

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For all these reasons, a Section 1983 plaintiff seeking damages for the wrongful initiation of criminal proceedings based on fabricated evidence should be required to prove that the criminal proceedings were terminated in his favor as an element of his Section 1983 claim. Until that event occurs, the Section 1983 plaintiff does not have a complete and present cause of action, and his Section 1983 claim does not accrue. See *Heck*, 512 U.S. at 489-490. Because petitioner filed his Section 1983 claim within three years of the favorable termination of the criminal proceedings against him, his claim is timely. The court of appeals' judgment to the contrary therefore should be reversed.[7]

III. ON REMAND, PETITIONER'S CLAIM LIKELY SHOULD BE DISMISSED ON THE BASIS OF ABSOLUTE PROSECUTORIAL IMMUNITY

In the district court, respondent argued that, even if petitioner's fabricated-evidence claim was timely, it was barred by absolute prosecutorial immunity. Neither

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[7] Because incorporating a favorable-termination requirement into petitioner's Section 1983 claim resolves this case, the Court need not reach petitioner's alternative theory that, even if his claim arose before the end of criminal proceedings, the violation "continued" until those proceedings terminated. See Pet. Br. 44-50. Unlike the elements question, that theory raises difficult questions under this Court's precedents. Although the analysis should similarly follow "common-law tort principles," *Wallace*, 549 U.S. at 388; see *id.* at 388-390, the malicious-prosecution analogy provides no help. Such a claim does not "continue" in the manner petitioner suggests, because it does not arise at all until the criminal proceedings are terminated. And if the Court were to reject the malicious-prosecution analogy, it is not clear what other common-law tort, if any, could guide the analysis. See Pet. Br. 25-27 (explaining why neither false imprisonment nor abuse of process is analogous to petitioner's claim).

the district court nor the court of appeals passed on that argument. Because this Court is a "court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the government agrees that the "question of absolute immunity is properly left for remand." Pet. Br. 25 n.7. On remand, however, the district court should likely dismiss petitioner's fabrication-of-evidence claim against respondent on absolute-immunity grounds.

Although Section 1983 does not expressly provide for a "defense of official immunity," certain common-law immunities "were so well established in 1871, when [Section] 1983 was enacted, that '[this Court] presume[s] that Congress would have specifically so provided had it wished to abolish' them." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993) (citation omitted).[8] As the Court has observed, "at common law prosecutors were immune from suits for malicious prosecution and for defamation," and "this immunity extended to the knowing use of false testimony before the grand jury and at trial." *Burns* v. *Reed*, 500 U.S. 478, 485 (1991) (citation omitted); see *Buckley*, 509 U.S. at 269-270.

To be sure, "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" *Buckley*, 509 U.S. at 273 (citation

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[8] The same immunity analysis does not apply to prosecutions by the United States under 18 U.S.C. 241 and 242. See *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law.").

omitted). In *Buckley*, this Court found immunity inappropriate for a prosecutor who allegedly fabricated evidence at an "entirely investigative" stage, well before any criminal proceedings had begun—though the Court declined to address whether such conduct would constitute a "constitutional violation[] for which [Section] 1983 provides a remedy." *Id.* at 261, 274-275. Following *Buckley*, the Second Circuit has held that, although a prosecutor is absolutely immune from liability based on his presentation of false evidence to a grand jury, the same prosecutor may be held liable for fabricating evidence in an investigative capacity if "it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury." *Zahrey*, 221 F.3d at 353-354. In his complaint, petitioner relied on that authority in alleging a "fabrication of evidence" claim against respondent distinct from his "malicious prosecution" claim. Compl. Counts I, II, at 170, 171.

The government has serious doubts about following the Second Circuit's approach in *Zahrey* in this case. As an initial matter, it is not clear that Section 1983 should provide a remedy for the fabrication of evidence itself, rather than its subsequent use to harm the plaintiff. See *Buckley*, 509 U.S. at 281 (Scalia, J., concurring) ("I am aware of[] no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution."). It is also far from clear that the alleged fabrication of evidence in this case—all of which, petitioner alleges, was done in an effort "to initiate and continue [a] scapegoat prosecution" against him, Compl. ¶ 345, and much of which allegedly occurred after those proceedings began, see

Pet. Br. 8-12—was done by respondent acting in an investigative capacity.

But even putting those concerns aside, petitioner emphasizes repeatedly in this Court that he seeks to hold respondent liable *not* for the fabrication of evidence itself, but for the wrongful "initiation and maintenance of criminal proceedings" on the basis of that evidence. *E.g.*, Pet. Br. 3, 4, 26, 28, 30, 46. He analogizes respondent's conduct to malicious prosecution. And he complains (Br. 49) of respondent's "wrongful use of fabricated evidence * * * throughout the criminal proceedings." In the government's view, "[i]nsofar as [the claim is] based on respondents' supposed knowing *use* of fabricated evidence before the grand jury and at trial—acts which might state a claim for denial of due process—traditional defamation immunity provides complete protection from suit under [Section] 1983." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring) (citations omitted). In short, petitioner is correct that his claim for fabrication of evidence is analogous to one for malicious prosecution, but the analogy only drives home that petitioner's fabrication claim is likely barred by prosecutorial immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2019

No. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor (as the majority of circuits has held) or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use (as the Second Circuit held below).

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BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CoA Institute") respectfully submits this *amicus curiae* brief in support of petitioner.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae CoA Institute is a 501(c)(3) nonpartisan, nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.[2] CoA Institute uses various investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, representing third-party plaintiffs in actions against the federal government and appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA Institute has a particular interest in challenging government overreach in the criminal justice system and ensuring government accountability

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[1] Counsel of record for all parties received notice prior to the due date of the *amicus curiae*'s intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *See* Cause of Action Inst., *About*, www.causeofaction.org/about (last visited Nov. 12, 2018).

in maintaining the rule of law. In order to fulfill this mission, CoA Institute has represented criminal defendants in federal court, *e.g.*, *United States v. Black*, No. CR 12-0002 (N.D. Cal.), appeared as *amicus curiae* in *Yates v. United States*, 135 S. Ct. 1074 (2015), and appeared as *amicus curiae* in other criminal matters before this court. *See, e.g.*, *DeCoster v. United States*, 137 S. Ct. 2160 (2017); *Overton v. United States*, 137 S. Ct. 1248 (2017), *Marinello v. United States*, 138 S. Ct. 1101 (2017), and *Timbs v. Indiana*, No. 17-1091 (2019).

SUMMARY OF ARGUMENT

Prior to the ruling below by the Second Circuit, appellate courts uniformly analogized Section 1983 claims accusing government agents of using fabricated evidence to claims of malicious prosecution. As a result, these courts ruled that such claims accrued after criminal proceedings terminated in the defendant's favor. The Second Circuit instead decided that such claims are unlike malicious prosecution and therefore accrue when a defendant was first aware "that such [fabricated] evidence was being used," as this was when the defendant "knew or should have known" about the harm suffered.[3]

By employing this standard, the Second Circuit ruling denies the nature of fabricated evidence. Adoption of its novel rule would muddy ongoing criminal proceedings, squander judicial resources, create a Hobson's choice for Defendants, and impose an

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[3] *McDonough v. Smith*, 898 F.3d 259, 264 (2d Cir. 2018), (quoting *McDonough v. Smith*, No. 1:15-CV-01505, 2016 WL 5717263, at *11 (N.D.N.Y. Sept. 30, 2016)).

improperly narrow view of how fabricated evidence harms those it is used against.

Defendants in ongoing criminal proceedings, if asked to simultaneously act as civil plaintiffs, will be unable to effectively exercise their rights in either system. Relying on an expectation that civil proceedings will be stayed to mitigate the harm of this ruling is inadequate given the pleading standards introduced by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), as a civil complaint will require the accused to make statements about their case with exacting particularity. Even if those pleading standards had not been introduced, the creation of a class of civil suits which only exist to be stayed is illogical, will often contravene the doctrine of ripeness, and will shrink the already small number of attorneys available to take such cases.

Additionally, as this case demonstrates, it may be extremely difficult for a criminal defendant to know whether evidence is being fabricated by a state actor or if other bad actors are simply lying or creating false evidence for their own purposes. This is particularly the case when the government actor files materials before a court denying the allegations, as this acts as effective concealment of the wrong, and when found alongside diligence by the plaintiff, should toll any running of the statute.[4]

This Court briefly touched on some of these issues in *Wallace v. Kato*, 549 U.S. 384 (2007). However, that case considered a wholly different type of Section 1983 claim, was decided before *Twombly* and *Iqbal*, and

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[4] *Hobson v. Wilson*, 737 F.2d 1, 33 (D.C. Cir. 1984), *overruled in part on other grounds, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

referenced only civil cases entirely unrelated to the extant criminal matter, e.g. "a breach of contract claim against the prime contractor for [a defendant's] new home."[5] The Section 1983 claims at issue here involve statements and evidence from the same events as the criminal matter. This creates several complications and obliges parties to engage in the same type of speculative behavior and collateral attacks the Court disfavored in *Wallace* and its earlier related decision, *Heck v. Humphrey*, 512 U.S. 477 (1994). Such attacks against an ongoing criminal proceeding are equally disruptive as those against a conviction, if not significantly more so.

For these reasons, we urge the Court to adopt the approach used by the majority of circuit courts and designate the conclusion of criminal proceedings as the accrual date for claims of fabricated evidence.

ARGUMENT

I. The Second Circuit Adopted an Improperly Narrow View of the Harm Caused by Fabricated Evidence

The Court should evaluate the nature of this type of Section 1983 claim mindful of the severity and frequency of the misconduct at issue. Fabricated evidence is not a black swan; it is an invasive species.

Few doubt the seriousness of this misconduct. This Court has previously stated that false evidence "involves far more than an injury to a single litigant" and is "a wrong against the institutions set up to protect and safeguard the public, institutions in which

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[5] *Wallace v. Kato*, 549 U.S. 384, 396 (2007).

fraud cannot complacently be tolerated consistently with the good order of society."[6]

The type of fraud at issue here is alarmingly frequent and perpetrated by a variety of state actors. The pressure to achieve results – or simply the opportunity to exploit power – has led to both individual examples of fabricating evidence and a series of high-profile scandals in which state actors committed such fraud *en masse* over lengthy periods of time.

In Baltimore, Maryland, a police unit known as the Gun Trace Task Force recently engaged in a pattern of falsifying evidence as part of a widespread criminal scheme. The unit was designed to track the firearms responsible for a record rate of homicides in Baltimore by wearing plain clothes and using unmarked vehicles. Instead, the unit became corrupted to the point where "almost every member" of it was arrested and nearly 1,700 criminal cases were compromised due to misconduct such as planting drugs on innocent people.[7] The city has yet to determine how this fabrication became so pervasive; a state task force convened to examine the subject had its first meeting late last year.[8]

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[6] *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

[7] Jessica Lussenhop, *When Cops Become Robbers*, BBC (April 3, 2018), *available at* https://www.bbc.co.uk/news/resources/idt-sh/when_cops_become_robbers.

[8] Justin Fenton, *'Everything on the Table' as Commission Begins Examining Corrupt Baltimore Police Gun Trace Task Force*, THE BALTIMORE SUN (October 16, 2018), *available at* https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-gttf-commission-first-meeting-20181016-story.html.

Police officers are not the only state actors engaging in such behavior. In one recent scandal, a single Massachusetts lab technician fabricated evidence affecting *36,000* defendants.[9] This incident was not even unique in its own laboratory – unrelated misconduct by another technician required the dismissal of 10,000 additional cases.[10] Remarkably, the misconduct continued outside the laboratory, as further "fraud upon the court" was committed by two state assistant attorneys general who "tampered with the fair administration of justice" by manipulating evidence after the laboratory scandal had become public knowledge.[11]

When these fabrications occur outside of the laboratory, they can have fatal consequences. A police officer in Houston, Texas recently acquired a no-knock warrant by stating that an informant had bought drugs from a local house. Police stormed the house and killed the couple residing there, each of whom was in their late 50s. Five police officers were shot as well. No evidence of drug dealing was discovered, however, and the city's chief of police soon admitted that the warrant was based on "material untruth or lies," as the informant did not exist.[12] The FBI has now opened

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[9] Shira Schoenberg, *SJC Will Decide How to Reimburse Dookhan, Farak Defendants*, MASS LIVE (Sept. 13, 2018), *available at* https://www.masslive.com/politics/index.ssf/2018/09/sjc_will_decide_how_to_reimbur.html.

[10] *Id.*

[11] *Commonwealth v. Cotto*, No. 2007770, 2017 WL 4124972, at *34 (Mass. Super. June 26, 2017).

[12] Sarah Mervosh, *Houston Officer Lied About Confidential Informant in Deadly Drug Operation, Chief Says*, NEW YORK TIMES (Feb. 16, 2019), *available at* https://www.nytimes.com/2019/02/16/us/houston-police-gerald-goines.html.

an investigation into the seeming use of "false, fabricated information."[13] Thirty-five years of work by the officer is under review by the district attorney, encompassing 1,400 cases.[14]

Those accused of drug-related crimes are not the only parties wronged by fabricated evidence. The first scandal of this nature to engulf the New York State Police involved the decidedly low-tech method of photocopying fingerprints and was used against innocent defendants accused of crimes as serious as murdering a family of four.[15]

State actors who enforce regulations against companies may also engage in fabrication of evidence. In one such case, an oil refinery learned an employee had submitted a false report to regulators. The company fired the employee, voluntarily disclosed the issue, and brought the refinery back into compliance. The federal government nonetheless decided to prosecute four employees for the incident and issued indictments on ninety-seven counts. There was just one problem – the prosecution was based on fabricated evidence. A state actor had deleted key portions of the record when submitting it to a grand jury, removing the voluntary self-disclosure

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[13] *FBI Houston News Release*, FBI HOUSTON (Feb. 20, 2019), *available at* https://twitter.com/FBIHouston/status/1098350397578719233.

[14] *DA Ogg Announces Review Of 1,400 Cases*, OFFICE OF THE DISTRICT ATTORNEY, HARRIS COUNTY, TEXAS (Feb. 20 2019) *available at* https://app.dao.hctx.net/da-ogg-announces-review-1400-cases.

[15] *Former State Trooper Explains Ways He Fabricated Evidence*, NEW YORK TIMES (April 16, 1993), *available at* https://www.nytimes.com/1993/04/16/nyregion/former-state-trooper-explains-ways-he-fabricated-evidence.html.

completely.[16] All charges were eventually dropped against the employees, but only after years of unnecessary and harrowing legal proceedings. The company in this incident was fortunate to be among the largest in America and possess the resources to defend itself and its employees. Yet smaller companies will be far less able to recover from the harm that fabricated evidence inflicts on their operations and reputation.

The decision below increases the odds that such myriad wrongs will not be righted. The Court itself has good reason to reverse the Second Circuit so that incidents like this are more likely to be exposed and redressed. As discussed in Sections II and III, *infra*, the Second Circuit has created a rule which introduces numerous roadblocks to filing Section 1983 claims for fabricated evidence and serves no significant purpose. Additionally, by treating such claims as having accrued at defendant's first exposure to evidence he believes fabricated, it failed to understand how such claims differ from other Section 1983 claims such as those for false arrest. Fabricating evidence is not an incarceration with a distinct period, nor is it an object which is discarded after its initial use.[17] It is bound with the proceedings into which it was introduced for as long as those proceedings continue or can be renewed. Like any piece of evidence, it may be raised in opening statements, with multiple witnesses, and at closing arguments. The jury may consider this evidence, ask questions about it, or even base its verdict on it. Its significance can only be fully measured by defendants and courts after it has been

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[16] Mark V. Holden, *The Second Chance: A Movement to Ensure the American Dream*, 87 UMKC L. Rev. 61 (2018).

[17] *McDonough v. Smith*, 898 F.3d 259, 267 (2d Cir. 2018).

introduced and challenged at the criminal proceeding itself.

It must also be noted that, in this case, the subject of the Section 1983 claim "swore before the Court that he did not 'forge' or execute any affidavit in place of any witness."[18] In fact, the accused prosecutor in affirmation "painstakingly explained the procedure he implemented in having witnesses execute 190.30 affidavits."[19]

Such actions on the part of the accused prosecutor amount to concealment of the wrong and toll the statute of limitations. While "the case law reflects a variety of formulations" of the federal fraudulent concealment doctrine, the "keystone" of this doctrine consists of two factors: concealment by the wrongdoer and diligence by the wronged party.[20] Concealment is found when a party "contrives to commit a wrong in such a manner as to conceal the very existence of a cause of action, and [] misleads plaintiff in the course of committing the wrong."[21] Combined with the demonstrated diligence by plaintiff, the doctrine of tolling via fraudulent concealment applies.[22]

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[18] Joint Appendix at 306.

[19] *Id.*

[20] *Hobson, supra* note 4 at 33-4.

[21] *Id.* at 33. While "concealment by silence" may not have been sufficient, the sworn denials made by Smith to the trial court take us well beyond any such grey area.

[22] The 1,220 paragraph complaint submitted by plaintiff understandably complicated the district court's inquiry, but it cannot be criticized for failing to document the diligence demonstrated by petitioner in pursuing the fabrication claims.

Moreover, one of the rationales of statutes of limitations is that the accused is on notice that there are claims against him.[23] Smith, the defendant in this case, had a view of those claims, and no surprise or unfairness could be ascribed to the bringing of the civil suit after the close of prosecution given his on-the-record denials of any fabrication before the criminal court.

II. Having Section 1983 Claims Accrue During the Related Criminal Proceeding Will Traduce the Rights of the Accused and Waste Prosecutorial Resources

The barriers to filing a complex civil lawsuit in federal court were already substantial before the Second Circuit ruling in this case. The filing fee alone is more than a majority of U.S. households have saved in case of emergency.[24] The median cost of the subsequent civil lawsuit is nearly 40 times this amount.[25] By definition, a defendant facing imprisonment due

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[23] *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-9 (1944).

[24] BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM: REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017 (May 2018), *available at* https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf.

[25] Corina D. Gerety, *Excess and Access: Consensus on the American Civil Justice Landscape*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (Feb. 28, 2011), *available at* http://iaals.du.edu/publications/excess-and-access-consensus-american-civil-justice-landscape. This includes all federal civil cases, but it is almost certainly higher for Section 1983 cases due to the low likelihood of settlement.

to fabricated evidence is carrying an even heavier burden – he is facing state actors who are willing to break the law they purportedly enforce.

Even if a defendant overcame these obstacles and filed a timely Section 1983 lawsuit while facing criminal charges, the mere act of doing so would complicate his ability to defend against those charges effectively. First, it will create an additional adversarial relationship between criminal defendant and state agent, raising the threat of defendants being "punished" for filing civil actions. Such prosecutorial vindictiveness is sufficiently common to have a line of case law from this Court.[26] Retaliation by police officers and political officials against citizens who complain about official misconduct is also a well-known and well-litigated phenomenon.[27]

Second, when this Court last spoke on this issue in *Wallace*, it had not yet issued decisions in *Iqbal* and *Twombly*. The pleading standards established by these cases now require criminal defendants such as the petitioner to discuss with specificity the events which resulted in their prosecution. This puts them in a nearly impossible position. The more detail included in a civil filing, the higher chance it survives a motion to dismiss – but also a higher chance those details will be used in the still-ongoing criminal matter.

The complications of concurrent proceedings do not solely affect the criminal defendant. Just as that party

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[26] *Alabama v. Smith*, 490 U.S. 794, 798 (1989) (discussing a significant number of Supreme Court cases establishing and construing the prosecutorial vindictiveness doctrine).

[27] *See, e.g., Lozman v. City of Riviera Beach*, 681 F. App'x 746, 749 (11th Cir.), *vacated and remanded sub nom. Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018).

must file a civil lawsuit while involved in a criminal matter, the government agents whose behavior is the subject of the Section 1983 claim must defend themselves while continuing their duties. At a minimum, this will require responding to the initial filing, and it may include more intrusive steps such as depositions and discovery about complex issues of subjective intent and objective law, with the result being a trial-within-a-trial concurrent with the criminal proceeding. Requiring Section 1983 lawsuits for fabricated evidence to be filed at this stage will functionally mandate collateral attacks on the validity of ongoing criminal proceedings, triggering many of the same concerns about finality and consistency expressed by the Court in *Heck*.[28] This policy would also be at odds with the existence and underlying purpose of the qualified immunity doctrine, which is to simplify the performance of official duties.

III. Early Accrual Contravenes the Ripeness Doctrine and Wastes Judicial Resources

By declaring Section 1983 claims to accrue at the moment a defendant becomes aware of fabricated evidence, the Second Circuit effectively asks criminal defendants to walk directly from the police station to the courthouse. This creates a dynamic in which timely lawsuits will in many cases be unripe.

As defined by this Court, "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[29] This contingency is present in myriad

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[28] *Heck v. Humphrey*, 512 U.S. 477, 484-5 (1994).

[29] *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)).

ways here. A defendant presented with false evidence is virtually never going to have proof of its fabrication by those acting under color of law when initially confronted with such evidence. Yet the ruling below requires criminal defendants to immediately tell the difference between a mistaken eyewitness, one lying for his own benefit, and one lying due to state fabrication – or the difference between laboratory error and laboratory fraud, the latter of which is often documented years later and in thousands of cases at once.[30] What seems like fabricated evidence may not even exist at all given the Court's allowance of police to use deceptive tactics during interrogations in order to induce confessions.[31] Police officers can concoct witness statements and cite physical evidence that doesn't exist when interrogating suspects, a power which muddies the evidentiary picture even further for defendants attempting to understand and exercise their rights. [32] Despite this thicket of possible situations and explanations, only a few of which justify Section 1983 litigation, the Second Circuit ruling means that a defendant's claim is purportedly "complete and present" the moment he first hears of any evidence he believes untrue.[33]

Just as defendants will be unprepared to properly plead these lawsuits under the Second Circuit's decision, courts will be unprepared to properly judge their merits. It is wasteful to devote judicial resources to claims based only on a criminal defendant's initial exposure to false evidence. This Court made clear in

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[30] Schoenberg, *supra* note 9.

[31] *Frazier v. Cupp*, 394 U.S. 731 (1969).

[32] *Oregon v. Mathiason*, 429 U.S. 492 (1977).

[33] *Wallace*, *supra* note 5, at 384.

Iqbal that conclusions are not sufficient to support a claim, but what else can a criminal defendant offer at such a nascent stage of proceedings in support of a claim of fabrication than the conclusion that prosecutors or police must be responsible? As happened here, the accused state actor can simply submit sworn affirmations denying any Section 1983 violation happened without being cross-examined or having any discovery issue. Such a wide gap between when a claim accrues and when it can be realistically pleaded under modern standards does not serve the interests of justice. As criminal trials progress, including through appeals, the source and validity of evidence are brought into the open and challenged as part of the adversarial process. Witnesses often change or recant their stories, and physical evidence is shown to be unreliable or reexamined in a wider context. Only after this examination of the evidence has concluded will Section 1983 claims of fabricated evidence be ready for adjudication.

This Court indicated in *Wallace* that stays of civil actions "until the criminal case or the likelihood of a criminal case is ended" were sufficient to avoid incomplete or speculative claims.[34] That conclusion should not be extended here. First, as noted in Section I, claims for fabricated evidence are inherently different in nature and severity than those for false arrest, the claim at issue in *Wallace*. Such arrests are pre-trial violations which end the moment a defendant is arraigned or otherwise detained pursuant to legal process.[35] Second, it cannot be assumed that stays will be issued. Courts are under no obligation to stay

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[34] *Id.* at 394.

[35] *Heck, supra* note 28, at 484.

a proceeding if the complaint contains insufficient detail to satisfy pleading standards, a situation likely here for reasons unrelated to the merits of the claim. Third, a reliance on stays assumes that lawsuits can be brought in the first place. As discussed in Section II, additional statements related to the criminal matter will complicate the defense in that matter, and a concurrent civil suit is a significant burden on those already mounting such a defense. Few criminal defense attorneys would ever advise a client to file a concurrent civil suit as a result.

The dramatically elongated timeline envisioned by reliance on stays will shrink the already limited number of attorneys willing to bring Section 1983 civil suits. As posited by *Wallace* and the Second Circuit decision here, there are only two possible outcomes for a fabrication of evidence due process lawsuit filed when first timely – a stay until completion of a criminal trial or a concurrent proceeding with that trial. The stay comes with all the uncertainty of what may come to light during a trial and the animus of those accused of fabrication, and the concurrent proceedings mean representing a client with momentous other demands on their time, resources, and loyalties. Neither is an appealing proposition for plaintiffs' lawyers being asked to steward complex litigation against state actors.

The question of remedy is also complicated by early accrual. A timely Section 1983 lawsuit filed during a criminal proceeding faces numerous questions about what remedy or damages are appropriate, many of which hinge on the resolution of that criminal proceeding. If the civil court finds that evidence was fabricated, it can hardly dictate to a separate criminal tribunal that such evidence be withdrawn. Yet any

other remedy leaves open the surreal possibility that a criminal defendant could win in civil court and then be convicted based on the very evidence found to have been fabricated. This goes against the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transactions."[36] Nor can we expect a criminal defendant to properly plead damages when the extent of the harm caused by the fabricated evidence is unknown. The use of fabricated evidence is always a severe affront to justice, but even the damage caused by an unsuccessful prosecution pales in comparison to one that ends with a wrongful conviction.

IV. Having Claims Accrue at the Conclusion of Criminal Proceedings Avoids These Problems

There is a clear solution to these conundrums, a point at which certainty exists for all parties: the end of the criminal proceeding. As noted in *Wallace*, defendants whose proceedings end with a conviction are expected to address that conviction via appeal, writ of habeas corpus, executive order, or other means of having it declared invalid before filing a Section 1983 claim which would impugn the conviction.[37] The reason for this is made clear: Section 1983 claims, and civil tort actions in general, should not serve as collateral attacks.[38]

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[36] *Id.* (quoting 8 S. Speiser, C. Krause, & A. Gans, American Law of Torts § 28:5, 24 (1991)).

[37] *Wallace*, *supra* note 5, at 392 (quoting *Heck v. Humphrey*, 512 U.S. 477 (1994)).

[38] *Id.*

The same logic applies without a conviction. While the petitioner here was ultimately acquitted, he should not be punished for having allowed an ongoing criminal process to conclude – and the purportedly fabricated evidence to be openly challenged – before filing a civil lawsuit claiming illegal behavior by those conducting the process. We recognize that a criminal defendant is not "absolved from all other responsibilities that the law would otherwise place upon him."[39] Yet the necessity of a fully-developed record is clear in equipping defendants and courts with the information required to properly plead and adjudicate claims of fabricated evidence, particularly since the decisions in *Iqbal* and *Twombly*. Section 1983 claims such as those of the petitioner are legal obligations directly tied to the criminal proceeding. Having that proceeding conclude first is the appropriate way to address the intolerable wrong of fabricated evidence, conserve prosecutorial and judicial resources, and serve the interests of justice. The majority of circuits are correct, and the Court should so rule.

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[39] *Id.* at 396.

CONCLUSION

For the foregoing reasons, the Court should find that fabricated evidence claims accrue at the conclusion of criminal proceedings.

Respectfully submitted,

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No. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH, PETITIONER,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AT NYU SCHOOL OF LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, AND THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae are four organizations that have an interest in the fair and efficient administration of criminal justice.[1]

Center on the Administration of Criminal Law at NYU School of Law. The Center is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and public policy advocacy.[2] The Center regularly participates as *amicus curiae* in cases raising substantial legal issues regarding interpretation of the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources. The Center also defends criminal justice practices where discretionary decisions align with applicable law and standard practices and are consistent with law-enforcement priorities.

American Civil Liberties Union. The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil-rights laws.

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[1] No party or counsel for any party authored any part of this brief or made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

[2] *Amici* the Center on the Administration of Criminal Law and the Brennan Center for Justice are affiliated with New York University, but no part of this brief purports to represent the views of New York University School of Law or New York University.

Founded nearly 100 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of constitutional rights, both as direct counsel and as *amicus curiae*. Through its Criminal Law Reform Project, the ACLU engages in nationwide litigation and advocacy to enforce and protect the rights of people accused of crimes.

New York Civil Liberties Union. The New York Civil Liberties Union is the New York State affiliate of the American Civil Liberties Union and is a non-profit, non-partisan organization with over 180,000 members. The NYCLU is devoted to the protection and enhancement of fundamental rights and liberties. Among the most fundamental are the rights to justice and fairness for defendants in the criminal justice system. The NYCLU regularly participates as *amicus curiae* in cases that raise questions about fundamental rights and liberties.

Brennan Center for Justice at NYU School of Law. The Brennan Center is a non-profit, nonpartisan public policy and law institute that seeks to secure our nation's promise of "equal justice for all" by creating a rational, effective, and fair criminal justice system. The Brennan Center advocates for reshaping laws and public policies that undermine this vision.

Amici's interests are directly affected by the issues presented in this case. The Second Circuit adopted a rule for accrual of Section 1983 claims based on fabrication of evidence that interferes with the fair and efficient administration of criminal justice. Because the Second Circuit's rule threatens the legitimacy of the criminal justice system and the public's faith in it,

amici respectfully request that the Court reverse the decision below and hold that Petitioner's Section 1983 claim did not accrue until his criminal proceedings ended in his favor.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution's guarantee of a fair and impartial criminal justice system can be achieved only if prosecutors are committed to ensuring "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). This Court long ago rejected the notion that prosecutors should try to secure convictions at all costs, because "[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

The fairness and legitimacy of the criminal justice system depend on the safeguards that deter prosecutors from engaging in misconduct. Civil lawsuits seeking monetary damages under 42 U.S.C. § 1983 play a critical role in deterring prosecutorial misconduct, but the Second Circuit's decision in this case threatens to weaken their effectiveness.

Under the Second Circuit's ruling, a Section 1983 claim based on fabrication of evidence accrues when the defendant "learn[s] of the fabrication of the evidence and its use against him in criminal proceedings." Pet. App. 13a. The limitations period thus begins to run for many defendants at the start of criminal proceedings, when defendants are "indicted and arrested" and learn of the evidence being used against them. *Id.* Because criminal proceedings often

take years to conclude, starting the limitations period for a fabrication-of-evidence claim so early means that many defendants are forced to make a difficult choice: they must either forgo bringing a Section 1983 suit or initiate parallel civil actions while their criminal proceedings are ongoing. Regardless of which choice a defendant makes, the justice system and our trust in it suffer.

I. Section 1983 suits play an important role in deterring prosecutorial misconduct. They deter prosecutorial misconduct because the threat of monetary damages affects a prosecutor's behavior, as will the reputational costs that accompany public accusations that the prosecutor has violated the Constitution or other federal law. Although this Court has suggested that prosecutorial misconduct can also be deterred through criminal prosecutions and bar disciplinary proceedings, prosecutors are subject to those sanctions so infrequently and unsuccessfully that they do not adequately deter misconduct. Those proceedings are also inadequate because they do not provide redress to the victims of constitutional misconduct, nor do they typically halt illegal practices at a systemic level, as Section 1983 claims can.

Section 1983 suits cannot deter misconduct if criminal defendants do not file them. By requiring the defendant to file a civil suit before criminal proceedings are complete, the Second Circuit's rule discourages Section 1983 suits, even when they have merit. Faced with the prospect of initiating parallel proceedings, many criminal defendants will reasonably give up the prospect of monetary damages in a civil

suit because pursuing that remedy may prejudice resolution of the criminal proceeding. This prejudice can take many forms. Filing a civil suit against a prosecutor could sufficiently anger the prosecutor that he or she will seek a longer sentence, add charges or enhancements, or be less willing to negotiate a plea agreement—all of which are virtually unreviewable acts of discretion. Filing a civil suit also could require the criminal defendant to reveal his defense strategy and risk self-incrimination. And for those defendants willing to file a civil suit while criminal proceedings are pending, they still may not do so because the strength of the suit will be hard to determine before the criminal proceedings conclude. As a result, finding a lawyer to bring the case could prove to be too difficult—particularly for low-income defendants.

II. Even if a criminal defendant risks filing a Section 1983 suit while criminal proceedings are ongoing, that suit will come at a significant cost to the criminal justice system. Parallel criminal and civil proceedings interfere with the fair and efficient administration of the criminal justice system in at least three ways. *First*, parallel proceedings split the parties' resources and attention between the criminal and civil proceedings. *Second*, parallel proceedings affect the parties' strategic decisions. *Third*, parallel proceedings create the risk of inconsistent rulings and judgments in the criminal and civil proceedings, which undermines the legitimacy of the criminal proceedings.

This Court can avoid these problems by rejecting the Second Circuit's rule in favor of the approach taken by the overwhelming majority of the courts of appeals that have decided the issue. Those courts

have held that a Section 1983 claim based on fabrication of evidence accrues upon the conclusion of criminal proceedings in the defendant's favor.[3] *See Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (endorsing approach that "avoids parallel litigation").

ARGUMENT

I. BY DISCOURAGING THE FILING OF SECTION 1983 SUITS, THE SECOND CIRCUIT'S RULE UNDERMINES A CRITICAL TOOL FOR DETERRING PROSECUTORIAL MISCONDUCT.

Prosecutions involving fabricated evidence deprive defendants of fair judicial proceedings and undermine public confidence in the judicial system. The integrity of the criminal justice system therefore demands that prosecutors, police officers, and other state officials are adequately deterred from fabricating evidence for use in criminal proceedings. Civil lawsuits seeking monetary damages under Section 1983 provide a powerful deterrent for the prosecutorial misconduct at issue here. Yet the Second Circuit's ruling threatens to weaken the deterrent effect of Section 1983 suits by

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[3] *See Floyd v. Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018); *Castellano v. Fragozo*, 352 F.3d 939, 959–60 (5th Cir. 2003) (en banc); *Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017); *Bradford v. Scherschligt*, 803 F.3d 382, 387–89 (9th Cir. 2015); *Mondragón v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008). The Second Circuit stands alone as the only court of appeals to hold that a fabrication-of-evidence claims accrues when the plaintiff learns that the prosecution has relied on fabricated evidence. *See* Pet. App. 12a-13a.

discouraging criminal defendants from bringing these suits, even when their claims have merit.

A. Section 1983 Suits Play an Important Role in Deterring Prosecutorial Misconduct.

1. Section 1983 claims are a "vital component of any scheme" for addressing prosecutorial misconduct, like fabrication of evidence. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980). This is because Section 1983 serves two purposes: it compensates individual plaintiffs and, equally important, deters future misconduct. *See Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (Section 1983 acts "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."). The statute embodies Congress's determination that "the public as a whole has an interest in the vindication of the rights conferred by [Section 1983], over and above the value of a civil rights remedy to a particular plaintiff." *City of Riverside v. Rivera*, 477 U.S. 561, 574–75 (1986).

"It is almost axiomatic that the threat of damages has a deterrent effect." *Carlson v. Green*, 446 U.S. 14, 21 (1980); *see also Imbler v. Pachtman*, 424 U.S. 409, 442 (1976) ("It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct."). The knowledge that a government actor will be liable for misconduct creates an "incentive for officials who may harbor doubts about the lawfulness of their intended actions to err

on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S. at 651–52. The threat of damages also encourages policymakers to adopt rules and programs aimed at minimizing the infringement of constitutional rights, which "are particularly beneficial in preventing [] 'systemic' injuries." *Id.* at 652. Finally, "valuable information is unearthed and exposed" over the course of Section 1983 litigation, which can engender policy changes either because this information was "previously unknown" or because policymakers are pressured by "publicity that attends the exposure of the information." Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 859–61 (2001).

Section 1983 suits have proven to have a deterrent effect in practice. Police departments have used lawsuit data—information generated during civil litigation, including damages awards and evidence uncovered by discovery—to identify systemic problems and calibrate personnel and training decisions accordingly. *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012). For example, the Portland police department performed trend analyses on lawsuit data, which allowed it to identify that excessive force claims involving blows to the head were disproportionately being asserted against officers at one police station. *Id.* at 854. Following training, those claims declined. *Id.* The Los Angeles Sheriff's Department similarly used litigation data as part of a semiannual review to identify that two of its 23 stations were responsible for 70 percent of all police misconduct litigation over the six-month period under review. *Id.* at 855. That finding led to an

investigation into those stations, which triggered staffing changes and training. *Id.* at 856. As a result, "the number of shootings at the station ... dropped dramatically, even as the crime statistics and arrests remained stable." *Id.*[4]

2. The Court has expressed concern that Section 1983 suits may over-deter prosecutors as a general matter, causing them to "shade [their] decisions instead of exercising the independence of judgment required by [their] public trust." *Imbler*, 424 U.S. at 423. Prosecutorial immunity thus bars suits against prosecutors for their prosecutorial functions. And the powerful deterrent effect of Section 1983 suits is unnecessary, the Court has explained, because a prosecutor engaging in misconduct may face criminal prosecution or bar disciplinary proceedings. *See id.* at 429. But the Court's reasons for prohibiting certain kinds of Section 1983 claims against prosecutors do not apply when, as here, a prosecutor is accused of fabricating evidence.

The Court should not be concerned about prosecutors being overly deterred when the issue is whether to fabricate evidence for use in criminal proceedings. Prosecutors must frequently exercise discretion and

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[4] Section 1983 claims even have a deterrent effect on government agencies who are insured from having to pay damages awards. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1211 (2016) ("Insured agencies may feel pressures associated with payouts even more acutely, regardless of whether they directly contribute to insurance premiums."). This is because public agency insurers, like other insurers, engage in risk management by pricing insurance based on past conduct and using limits and deductibles to reduce moral hazard. *See id.* at 1205.

make tough judgment calls, but deciding whether to fabricate evidence and introduce it at trial is not such a decision. Indeed, the district court correctly recognized that a prosecutor's immunity does not extend to allegations that he fabricated evidence, because the fabrication of evidence is not a prosecutorial function. *See* Pet. App. 61a. Section 1983 suits for fabricating evidence do not run the risk of punishing the "honest prosecutor" who in good faith steps over the constitutionally permitted line. *See Imbler*, 424 U.S. at 425. Rather, they serve the necessary purpose of deterring the dishonest prosecutor contemplating whether to fabricate evidence.

Section 1983 suits are necessary to deter prosecutors from fabricating evidence. The possibility that prosecutors could face criminal charges for their misconduct is too remote to affect their behavior. A 2003 study of more than 2,000 cases involving prejudicial prosecutorial misconduct found that *none* of the prosecutors faced criminal charges for their actions. *See* CTR. FOR PUB. INTEGRITY, *Harmful Error: Investigating America's Local Prosecutors*, at app. 79–90 (2003); *see also* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 60 (2005).[5] Federal prosecutions under 18 U.S.C. § 242

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[5] Since the study was completed, one prosecutor was criminally prosecuted and convicted for obtaining a wrongful conviction by withholding evidence and making false statements to the court. *See* Alexa Ura, *Anderson to Serve 9 Days in Jail, Give Up Law License as Part of Deal*, TEX. TRIB. (Nov. 8, 2013), https://www.texastribune.org/2013/11/08/ken-anderson-serve-jail-time-give-law-license. The newsworthiness of this conviction demonstrates how rare these prosecutions are. *See* The Editorial Board, *A Prosecutor Is Punished*, N.Y. TIMES (Nov. 8, 2013),

confirm this point. This provision was enacted in 1866 to provide criminal liability for government officials who violate constitutional protections. Johns, *supra*, at 71. But in the 153 years since its enactment, only one prosecutor has been convicted under the statute. *See id.*

Disciplinary actions by state bars are similarly ineffective as a deterrent. Of the more than 2,000 cases involving prejudicial prosecutorial misconduct identified in the Center of Public Integrity report, prosecutors were disciplined in only 44 cases. CTR. FOR PUB. INTEGRITY, *supra*, at app. 79. State bar associations—who are tasked with policing prosecutorial misconduct—recognize the problem. A New York Bar Association task force concluded that, among the 53 wrongful conviction cases it surveyed, it did not find any "public disciplinary steps against prosecutors," and concluded that prosecutors face "little or no risk" as a result of their misconduct. N.Y. State Bar Ass'n, *Final Report of the N.Y. State Bar Ass'n's Task Force on Wrongful Convictions*, at 29 (2009), https://www.nysba.org/wcreport. Similarly, a California commission analyzed 54 cases involving prejudicial misconduct and found that none of these cases resulted in a report to the state bar—even though state law requires judges to give such notice.

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https://www.nytimes.com/2013/11/09/opinion/a-prosecutor-is-punished.html ("The 10-day jail sentence for the prosecutor, Ken Anderson, is insultingly short—the victim of his misconduct, Michael Morton, spent nearly 25 years in prison. But because prosecutors are so rarely held accountable for their misconduct, the sentence is remarkable nonetheless.").

See Cal. Comm'n on the Fair Admin. of Justice, *Final Report* 71 (2008), https://bit.ly/2Tpp6fq.

In short, when fabrication of evidence is at issue, over-deterrence should not be a concern, and criminal and disciplinary proceedings are insufficient. Section 1983 suits are thus essential to deter prosecutorial misconduct.

B. The Second Circuit's Rule Reduces the Deterrent Effect of Section 1983 Suits by Discouraging Plaintiffs From Filing Even Meritorious Claims.

Section 1983 suits can deter prosecutorial misconduct only if plaintiffs are willing to file them. Under the Second Circuit's rule, many criminal defendants will reasonably choose not file Section 1983 suits—even if they have a strong claim—because of the risk inherent in filing a civil suit before criminal proceedings have concluded. Many defendants will make a strategic decision to give up the prospect of monetary damages in the civil suit to maximize the likelihood of prevailing in the criminal proceeding. And for those defendants who do not make this strategic choice, they still may not file a Section 1983 suit for a practical reason: many defendants—in particular, low-income defendants—could have difficulty finding a lawyer to take the case.

1. A criminal defendant may rationally decide not to pursue a meritorious Section 1983 claim because doing so while his criminal proceedings are pending could hurt his chances of achieving a favorable resolution in the criminal proceedings.

A criminal defendant often chooses not to testify at trial and instead exercises his Fifth Amendment right not "to be a witness against himself." U.S. Const. Amd. V. But a plaintiff in a Section 1983 suit typically cannot adopt this same strategy. To meet the civil pleading standard required to state a Section 1983 claim, *see Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the criminal defendant must explain when he or she became aware of fabricated evidence and how he or she knew it was fabricated. This explanation would risk disclosing the defendant's trial strategy to the prosecutors to whom he or she is adverse in parallel criminal proceedings.

The concerns over filing a civil suit during the criminal proceedings are even greater for defendants who are considering resolving the criminal charges through a plea agreement.[6] In negotiating a plea deal, defendants are seeking leniency from the government, including by displaying a willingness to cooperate. But naming the prosecutor as a defendant in a civil case could anger the prosecutor, which could imperil the possibility of a favorable plea agreement. Even worse, filing the civil suit could cause the prosecutor to revoke the plea offer entirely, add charges or enhancements, or seek a harsher sentence upon conviction—all of which are virtually unreviewable acts of discretion. Indeed, this concern is one of the reasons why few criminal defendants file state bar complaints even when they are aware of prosecutorial

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[6] Given that more than 90 percent of criminal cases are resolved by plea bargain, this is virtually every defendant. *See, e.g.*, Lauren-Brooke Eisen et al., *Federal Prosecution for the 21st Century*, BRENNAN CENTER FOR JUSTICE, 27 (Sept. 23, 2014), https://bit.ly/2UbiJJL.

misconduct. *See* David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 211 (2011).

2. Criminal defendants also are less likely to file a Section 1983 suit before criminal proceedings conclude because they will have more difficulty retaining counsel to bring the suit. Attorneys are more likely to bring Section 1983 fabrication-of-evidence claims once they can see that the claims have some merit. But the strength of a Section 1983 claim is typically difficult to judge until after the criminal proceedings are complete. *See id.* at 210 ("vast majority of known instances of prosecutorial misconduct" are substantiated over the course of a trial or appellate proceedings).

This concern is especially great for low-income criminal defendants. Such individuals are more likely to be subjected to pretrial incarceration. *See* JUSTICE POLICY INSTITUTE, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, at 10 (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf (since 1992, use of money bail has increased 32 percent and average bail amounts have increased by $30,000). And individuals who are detained pretrial are less able to secure and work with counsel to prepare their case. *See id.* at 13.

Section 1983 suits can serve as a powerful deterrent to prosecutorial misconduct only if criminal defendants are willing and able to file them. The Second Circuit's rule, by forcing many plaintiffs to file

suit while their criminal proceedings are ongoing, discourages filing of meritorious suits, and thus weakens the deterrent effect of these suits.

II. BY INVITING PARALLEL CRIMINAL AND CIVIL PROCEEDINGS, THE SECOND CIRCUIT'S RULE INTERFERES WITH THE FAIR AND EFFICIENT ADMINISTRATION OF THE CRIMINAL JUSTICE SYSTEM.

Despite the practical obstacles to, and strategic reasons for not filing a Section 1983 suit while criminal proceedings are ongoing, some defendants will surely still initiate a parallel civil proceeding. Because of the difficulties inherent in administering parallel proceedings, those suits—while potentially protecting the defendant's rights—threaten to harm the criminal justice system more broadly.

This Court has long recognized the importance of "avoid[ing] parallel litigation." *Heck*, 512 U.S. at 484. Parallel litigation is undesirable in part because it raises a host of practical problems. It also wastes judicial resources and increases the costs of litigation. Moreover, parallel proceedings raise difficult legal issues related to the preclusive effect decisions in one forum have in the other. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 105 (1980) (applying collateral estoppel to Section 1983 claims). As a result, the Court has sought to "avoid a duplication of legal proceedings ... where a single unit would be adequate to protect the rights asserted." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

Here, parallel criminal and civil proceedings would interfere with the fair and efficient administration of the criminal justice system in at least three ways. *First*, they split the parties' resources and attention between the criminal and civil proceedings. *Second*, they distort the strategic decisions that the parties make. *Third*, they create the risk of inconsistent rulings and judgments in the criminal and civil proceedings, which can call the legitimacy of both proceedings into question. The Court should avoid these problems by rejecting the Second Circuit's rule.

A. Parallel Proceedings Needlessly Divert the Parties' Attention from the Criminal Proceeding.

A criminal proceeding carries such serious consequences, for both the defendant and the general public, that the prosecutor and defendant should be allowed to focus their attention on that matter. Only once the criminal proceeding has completed should the parties turn their attention to the civil rights matter. By instead encouraging criminal defendants to file parallel civil suits, the Second Circuit's rule interferes with both the prosecutor's ability to prosecute the case and the defendant's ability to defend himself.

1. Section 1983 lawsuits filed during criminal proceedings threaten to divert both parties' time and resources from the criminal proceedings. Parallel proceedings may require prosecutors to prepare for trial in the criminal proceeding while they sit for depositions or respond to discovery requests in the civil case. The potential for distraction is even greater for criminal defendants who file civil actions. They cannot

simply focus on developing a defense strategy that best serves their interests in the criminal proceeding. They must instead devote considerable resources to the civil action, advancing their own legal theories and conducting the discovery necessary to prove them. Given the importance of criminal proceedings—where defendants often face the possibility of decades in prison—they should give their complete attention to defending their liberty, rather than simultaneously focusing on damages actions.

2. The problem of diverting the parties' attention from the criminal matter is exacerbated by the fact that the parties may devote substantial time and effort to litigating issues that would not arise if the civil suit were brought after the criminal proceedings conclude.

For example, the Second Circuit's rule risks spawning needless litigation over when the Section 1983 claim accrued. Under the majority rule, a fabrication-of-evidence claim accrues when the criminal proceedings conclude in the defendant's favor. This accrual date can be determined without discovery by referring to the docket in the criminal case. In contrast, a fabrication-of-evidence claim accrues under the Second Circuit rule when the defendants knows, or should have known, about the fabrication of evidence. *See* Pet. App. 13a. Intrusive discovery—potentially including discovery involving the defendant's communications with his defense lawyers—will often be necessary to determine when the defendant learned of the fabricated evidence. Indeed, it is telling that the Second Circuit did not specify when the fabrication-of-evidence claim accrued under its rule,

stating only that it was somewhere between when Petitioner was "indicted and arrested" and when his first trial concluded. Pet. App. 13a–14a.

3. Given the problems created by parallel proceedings, a party in the civil case may seek a stay pending completion of the criminal proceeding. *See Wallace v. Kato*, 549 U.S. 384, 393–94 (2007). But the possibility of a stay hardly alleviates the problems caused by parallel litigation. This Court has never suggested that a stay should be granted as a matter of course. Instead, as discussed below, whether to grant a stay requires balancing the equities in a particular case. Even when those equities favor a stay, the parties still must litigate the stay motion in each case. And doing so will require expending time and resources that would be better spent on the criminal proceedings.

District courts have broad discretion over whether to grant a stay. When faced with a request to stay civil proceedings or limit civil discovery, they must "weigh competing interests" arising from the parallel proceedings, *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936), and consider what "the interests of justice" require, *Degen v. United States*, 517 U.S. 820, 826–27 (1996). Because "[a] total stay of civil discovery pending the outcome of related criminal matters is an extraordinary remedy," *Weil v. Markowitz*, 829 F.2d 166, 174 n.17 (D.C. Cir. 1987), some courts may permit discovery to avoid prejudicing the plaintiff in the civil lawsuit.

But even when the civil case is stayed, parallel proceedings still are inefficient and interfere with the

parties' ability to focus on the criminal matter. To obtain a stay of the civil lawsuit, a party must show that a stay is necessary—a fact-intensive and time-consuming process that distracts from the criminal proceeding as well as the merits of the allegations raised in the civil action. *See, e.g., Scheuerman v. City of Huntsville*, 373 F. Supp. 2d 1251, 1258 (N.D. Ala. 2005) (prosecutors seeking a stay must "explain in detail" the impact of civil discovery on the related criminal proceeding).[7]

In short, parallel proceedings will necessarily divert the parties' attention from the matter that should take priority—the criminal proceedings. Both the prosecutor and criminal defendant are better served by focusing first on the criminal matter, and then turning to Section 1983 litigation, if necessary, once the criminal proceedings conclude.

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[7] The Court should not adopt a rule allowing for automatic stays of Section 1983 suits, because automatic stays are at odds with the purpose of those suits—"to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 503 (1982); *see also Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912) ("An imperative rule that the civil suit must await the trial of the criminal action might result in injustice."). And if the Second Circuit's accrual rule can be efficiently administered only if district courts automatically issue stays, then the rule has no practical value. This outcome would undermine the purpose of an early accrual date by prohibiting claims from advancing before criminal proceedings conclude.

B. Parallel Proceedings Distort the Parties' Strategic Decisions.

The Second Circuit's rule also undermines the fair and efficient administration of criminal justice because it affects the strategic decisions that the parties make. When the parties are involved in related criminal and civil matters, they cannot simply make decisions based on the criminal proceeding. They also must consider how their actions affect the civil action.

Criminal defendants are most severely harmed by the need to balance potentially conflicting strategies. As defendants in the criminal matter, they may remain silent and force the government to carry its burden of proving guilt beyond a reasonable doubt. *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964) (privilege against self-incrimination reflects "our sense of fair play which ... requir[es] the government in its contest with the individual to shoulder the entire load"). In contrast, as plaintiffs in the Section 1983 case, they bear the burden of proving their claims and therefore must advance their own legal theories and develop the evidence to prove them. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (noting "ordinary default rule that plaintiffs bear the risk of failing to prove their claims"). Moreover, any evidence that a prosecutor obtained during the civil case likely would be admissible in the criminal proceeding. *E.g.*, *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1200 (Fed. Cir. 1987). As a result, a defendant's ability to defend himself in the criminal proceeding could be undermined by any discovery the prosecutor obtains in the civil proceeding. To maximize their chances of success in both

proceedings, criminal defendants must often make strategic decisions that differ from the choices they would make based solely on the criminal proceeding.

Rather than permit a pending civil suit to affect the strategy—and perhaps the outcome—of the criminal proceeding, the Court should reject the Second Circuit's rule and hold that a Section 1983 claim based on fabrication of evidence does not accrue until the criminal proceeding has ended.

C. Parallel Proceedings Can Lead to Conflicting Decisions That Undermine Public Confidence in the Judiciary.

By encouraging parallel litigation, the Second Circuit's rule will increase conflict between federal and state courts, threatening to undermine public confidence in the judiciary.

As this Court has recognized, parallel litigation poses a fundamental risk to our federalism. By encouraging federal courts to use Section 1983 claims to preempt state-court decisions, the rule adopted below threatens to erode the "proper respect for state functions," *see Younger*, 401 U.S. at 43–44, that is "a bulwark of [our] federal system" of government, *see Allen*, 449 U.S. at 96. This concern for comity, as well as the more practical problems of parallel litigation, provide the basis for this Court's policy against federal interference in state criminal proceedings. *See Heck*, 512 U.S. at 484 (noting the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction").

Maintaining an appropriate "sensitivity to the legitimate interests of both State and National Governments," *Younger*, 401 U.S. at 44, is fundamental to preserving public confidence in our criminal justice system. That confidence is rooted in the orderly administration of justice and the finality of judicial decisions. *Cf. Montana v. United States*, 440 U.S. 147, 154 (1979) ("[M]inimizing the possibility of inconsistent decisions" is desirable in part because it "fosters reliance on judicial action"); *United States v. Atkinson*, 297 U.S. 157, 159 (1936) (noting "the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact").

A rule that encourages parallel litigation undermines the orderly administration of justice and finality and thus threatens to erode public confidence in the judiciary. *Cf. Heck*, 512 U.S. at 484–85 ("This Court has long expressed ... concerns for finality and consistency and has generally declined to expand opportunities for collateral attack."). Put differently, a rule that requires federal courts to respect state court proceedings will encourage the public to do the same. *Cf. United States v. Olano*, 507 U.S. 725, 736 (1993) (allowing appellate courts to correct plain forfeited errors affecting substantial rights if such errors "seriously affect[] the ... public reputation of judicial proceedings").

The Second Circuit's rule harms both federal-state relations and public confidence in the judiciary. First, it undermines the orderly administration of justice. For instance, the Second Circuit rule requires many criminal defendants to initiate parallel proceedings in

federal court in order to preserve their evidence-fabrication claims, but it also implies those same defendants must halt federal litigation if and when a conviction occurs—and then restart it if and when the conviction is reversed so that the *Heck* bar no longer applies. *See* Pet. App. 16a.

Second, by encouraging parallel proceedings, the Second Circuit's rule promotes federal-state conflicts, wastes resources, undermines finality, and raises a host of difficult legal issues. For example, the Second Circuit's rule would routinely force federal courts to confront issues such as the effect a denial of a motion to suppress allegedly fabricated evidence would have on a parallel Section 1983 claim. *Cf. Afro-Lecon*, 820 F.2d at 1200 (addressing whether district court erred in failing to stay civil proceedings where (1) plaintiff initiated civil case, (2) government indicted the plaintiff, (3) plaintiff's motions (one before and one after the indictment) to stay the civil case were denied, (4) government used deceptive means to obtain civil discovery for use in its criminal case, (5) now-criminal defendant's motion to suppress evidence in question in the criminal case was denied in part, and (6) civil plaintiff appealed the decision in the civil case, before a criminal trial had occurred).

The majority rule avoids these concerns. And by promoting respect for state courts, the orderly administration of justice, and the finality of judicial decisions, the majority approach also promotes public confidence in our criminal justice system.

CONCLUSION

For the foregoing reasons, the Second Circuit's judgment should be reversed.

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Attorney's Office decided to pursue a retrial—with the death penalty yet again as an option.

On August 8, 2016, Wright's retrial began. The prosecution relied on the same fabricated evidence as at Wright's first trial. On August 23, 2016, the jury deliberated for less than ten minutes before acquitting Wright on all charges. As the jury foreperson explained, "[t]he evidence was so compelling for Tony that there really could not have been any other verdict."[6]

Wright was finally released from prison on August 23, 2016—more than 25 years after he was first wrongly incarcerated based on fabricated evidence, and nearly two years after his conviction was first vacated. Wright was 20 years old when he was arrested and 45 years old when he was finally freed. He was deprived not only of decades of his own life but also the opportunity to watch his son—who was 4 years old when he was arrested—grow up.

After his acquittal, Wright brought a § 1983 wrongful conviction suit against the PPD detectives who framed him by fabricating his confession and other inculpatory evidence against him. Wright also brought claims against the City of Philadelphia, alleging that systematic failures in supervision and discipline created a Wild West atmosphere where detectives routinely engaged in egregious misconduct.

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[6] Vernon Odom, *Supporters Speak Out After Wrongly-Convicted Man Freed After 25 Years*, ABC6 Philadelphia (Aug. 24, 2016), https://perma.cc/3YAT-G68Y.

The lawsuit settled in June 2018.[7] Evidence of patterns of misconduct uncovered as part of Wright's suit is now being considered as a part of claims that the same detectives framed other innocent African-American men.[8]

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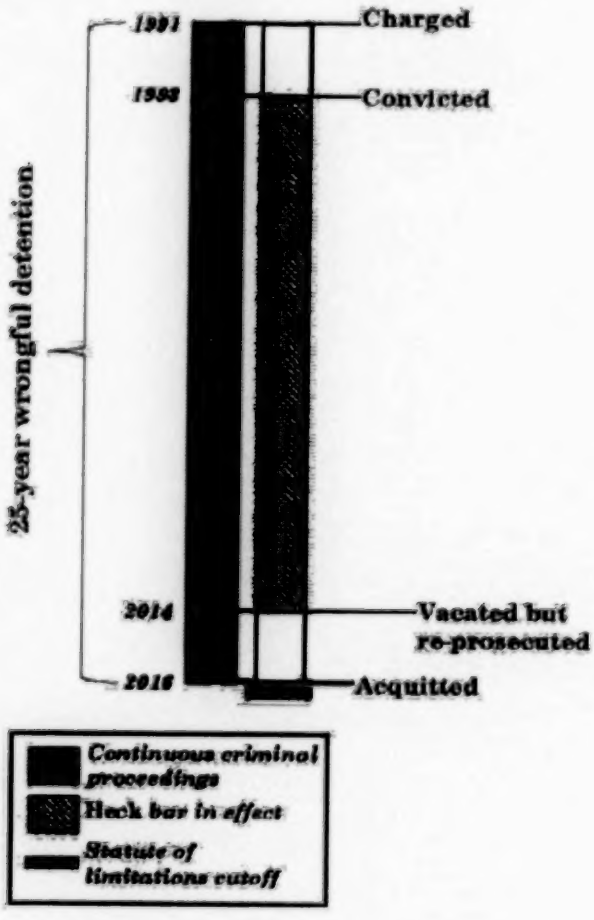
[7] Mensah M. Dean & Mark Fazlollah, *Philly Man, Wrongly Imprisoned for 25 Years, Gets Nearly $10 Million from City*, The Inquirer (June 6, 2018), https://perma.cc/26Y7-HNEM.

[8] Chris Palmer & Jeremy Roebuck, *Could One Philly Man's Exoneration Prompt Larry Krasner to Examine Other Decades-old Murders?*, The Inquirer (Feb. 16, 2018), https://perma.cc/3SDV-WH3K.

Chart 4: Anthony Wright's Case



Under *Heck*, Wright could not have brought his § 1983 suit until his conviction was vacated on September 22, 2014. At that time, though, he was facing re-prosecution with potential capital charges. Under the majority rule, accrual of his § 1983 suit would be further delayed until the criminal

proceedings finally resolved in his favor with the acquittal. But had the Second Circuit's accrual rule applied to his case, accrual would not have been deferred while those charges remained pending. Wright would have had to file a § 1983 suit while fighting to defend his life or risk being deprived of the opportunity to seek accountability and compensation for his 25 years of wrongful incarceration. Indeed, Wright was acquitted on August 23, 2016—one month before Pennsylvania's two-year statute of limitations on his § 1983 claims would have run. Had the prosecution been granted even one more continuance—or had this happened in one of the jurisdictions with a one-year statute of limitations for § 1983 claims—Wright would not have known whether he was acquitted or re-convicted until, under the Second Circuit's rule, his opportunity to file a § 1983 suit had already expired.

2. The case of John Restivo[9]

John Restivo spent 18 years wrongly imprisoned for a crime he did not commit before being exonerated by DNA evidence. As with Anthony Wright, even after Restivo's conviction was vacated, the prosecution continued to prosecute him based on the same tainted evidence. After the charges were ultimately dismissed, Restivo brought a § 1983 claim for fabrication of evidence. Under the Second Circuit's rule, the statute of limitations on Restivo's claim would have begun to run when his criminal conviction was vacated, despite the fact that he remained subject

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[9] All facts are taken from pleadings filed on the dockets at *Restivo v. County of Nassau*, No. 06-cv-6720 (JS)(SIL) (E.D.N.Y. 2006), and *Restivo v. Hessemann*, No. 14-cv-4662 (2d Cir. 2014).

to an ongoing criminal proceeding, again exposing him to the very likely outcome of forfeiting his § 1983 claim on statute-of-limitations grounds.

On December 5, 1984, the body of 16-year-old Theresa Fusco was found near railroad tracks in Lynbrook, New York. Fusco—who had been missing for nearly three weeks—had been raped, strangled with a rope and left naked. Understandably, there was immense community pressure to solve this horrific crime.

After months with no arrests, Nassau County detectives became convinced that 26-year-old John Restivo had committed the crime, believing he had abducted Fusco in the van used by his family moving business along with two coworkers. But detectives knew they lacked evidence to make a case against Restivo, and so lead detective Joseph Volpe fabricated some: he took hairs that had been removed from Fusco's body at autopsy and planted them among debris collected during a search of Restivo's van. A subsequent microscopic hair comparison confirmed that these hairs were Fusco's, providing the sole physical or forensic evidence linking Restivo to the crime.

At trial, Restivo and his co-defendant Dennis Halstead both testified to their innocence and presented alibis. Nevertheless, in December 1986, both men were convicted based on Volpe's fabricated forensic connection. Both were sentenced to thirty-three-and-one-third years to life in prison.

Restivo relentlessly sought to prove his innocence. From 1993 to 2003, he repeatedly sought

DNA testing as the technology improved and additional evidence was located. Finally, in 2003, testing on the spermatozoa taken from a vaginal swab collected at Fusco's autopsy definitively excluded Restivo, Halstead and the third defendant, John Kogut, as the source.

On June 11, 2003, the court vacated the convictions of all three men. But the Nassau County District Attorney remained determined to retry them. Despite consistent evidence that 16-year-old Fusco was a virgin, prosecutors spun speculative theories that the semen could have been left by a mysterious consensual partner or an alleged fourth co-conspirator whose identity had remained secret for nearly 20 years. In a vain attempt to prove guilt, DNA testing was ultimately conducted on an astonishing 86 other people—essentially everyone Fusco, Restivo or Halstead knew. But when each person tested was eliminated, that only further confirmed innocence. Two and a half years after the vacatur—on December 19, 2005—prosecutors finally dropped the charges against Restivo and Halstead.

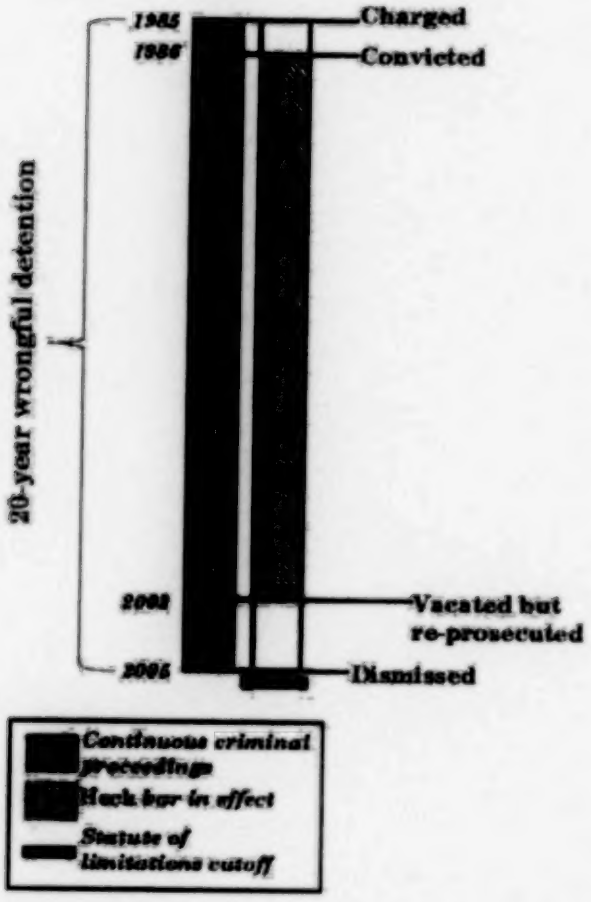
Restivo and Halstead then sued Volpe and the other detectives under § 1983 for fabricating evidence against them. In addition to the evidence of innocence—which proved Fusco's hairs could not have been found in Restivo's van because she had never been in his van—additional forensic evidence proved the hairs had been planted. The hairs allegedly found in Restivo's van bore signs of decomposition that take days post-mortem to develop. But the medical evidence established that Fusco's body had been left where it was found by the railroad tracks within an hour of her death. In other words, this evidence

proved the planted hairs had been collected at the autopsy—after several weeks of decomposition—not left in the van during the alleged abduction as police had claimed.

During discovery in the § 1983 suit, Restivo also learned for the first time of significant exculpatory evidence that had been hidden throughout the entire criminal proceedings. It turned out Volpe and the other detectives had received a tip, the day after Fusco's body was found, that Fusco's murder was connected to a car theft. The car had been stolen around the time Fusco disappeared and within a mile from where she was last seen. When the car was discovered, several weeks later, it was missing a rope (consistent with the murder weapon) and had a pair of striped ladies blue jeans, turned inside out, on the rear floorboard. Those distinctive jeans matched the description of what Fusco was last seen wearing; when her body was found, her clothes were missing. Although detectives spent days investigating this lead, they were unable to determine who had stolen the car. They later buried this exculpatory lead—which likely would have led to the true killer—to protect their case against Restivo and his co-defendants.

In 2014, after years of litigation, a Long Island jury found that Volpe had fabricated evidence and withheld exculpatory evidence, causing Restivo and Halstead's wrongful convictions. The Second Circuit later affirmed the verdict in full.

Chart 5: John Restivo's Case



Like Wright, Restivo had to wait years after his conviction was vacated for the criminal prosecution to be resolved in his favor. Under the majority rule, his time to bring a § 1983 suit would not begin to run until after the charges were dismissed. But had the Second Circuit's accrual rule been applied to him, the statute of limitations would have been running from the time

of the vacatur, even as the criminal charges simultaneously remained pending. As a result, Restivo could easily have missed any opportunity to bring a § 1983 suit against the detective who framed him.

D. Prolonged pretrial detention—the case of Jonathan Barr[10]

Jonathan Barr spent 18 years wrongly imprisoned—more than four years of it in pretrial detention—for a rape and murder he did not commit, before he was exonerated by DNA. Were the Second Circuit's rule to apply, Barr's claim for damages incurred pretrial would have accrued when the fabricated evidence was first used against him, long before he was tried and convicted. And because *Heck* only defers accrual for claims that arise at the time of trial, under the Second Circuit's rule *Heck* would not extend the time to seek damages for his pretrial detention. By the time he could actually sue—after his exoneration—Barr would have been unable to seek any damages for those first 4 years of wrongful incarceration.

In November 1991, 33-year-old convicted sex offender Willie Randolph abducted, raped, and murdered 14-year-old Cateresa Matthews, leaving her body, naked from the waist down, in a field in Dixmoor, Illinois. Jonathan Barr, Matthews's

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[10] All facts are taken from pleadings filed on the docket at *Barr v. Kachiroubas*, 12-cv-8327 (ARW) (N.D. Ill. 2012), unless otherwise noted.

14-year-old friend and middle school classmate, had nothing to do with these horrific crimes.

But as months went by without an arrest, Illinois State Police investigators began to focus on Barr and four other African-American teenagers. Lacking any true evidence implicating the innocent teens, they interrogated 15-year-old Robert Veal, who had learning disabilities and an IQ of 56. Detectives handwrote a false confession implicating Veal, Barr and the other three teens and coerced Veal to sign it. The statement included nonpublic details about the murder—including the specific clothing Matthews was wearing and the location of her injuries. The detectives falsely claimed these details had originated with Veal and proved the teens' guilt. Although police attempted to fabricate a statement from Barr—providing him a prewritten statement and falsely promising him if he signed it without reading it he could go home—Barr steadfastly refused. Nevertheless, based on Veal's fabricated statement and a similar one from another teen, all five were charged with Matthews's rape and murder.

Trial was delayed while the parties sought DNA testing, then in its infancy. When the results came back, they demonstrated that—contrary to the story in the false confessions—none of the five charged were responsible for Matthews's rape. Nevertheless, the prosecutors refused to drop the charges. At trial, the prosecutors relied on the fabricated evidence, arguing the nonpublic details in the statements were "like mini lie detectors" that proved guilt because "if they weren't there, they wouldn't know that." Barr was convicted in 1997—over four years after he was first

jailed based on the fabricated evidence—and sentenced to 85 years' imprisonment.

Nearly 14 years later, more advanced DNA testing identified Willie Randolph as the source of the semen found in Matthews's body. In 2011, all five convictions were vacated and the charges later dismissed. Barr was finally released in November 2011, at age 34. During his over 18 years of wrongful imprisonment, both of Barr's parents died. He was not even permitted to attend their funerals. As Barr later explained, "At the end of the day, I can't get those years back. We lost everything . . . My parents, grandparents, everyone is gone. . . . They don't even know the truth now."[11] Barr was later granted a certificate of innocence.

Barr and his co-defendants then brought a § 1983 wrongful conviction suit against the detectives who framed them by fabricating the false confessions. The lawsuit was settled in June 2014. Randolph would later be charged with Matthews's rape and murder in August 2016.

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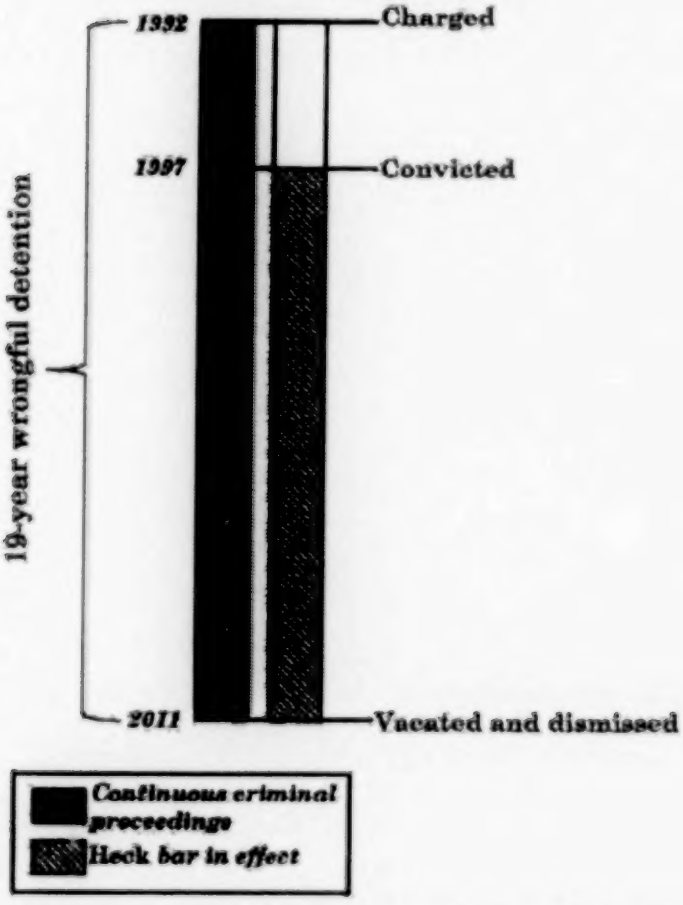
[11] Naomi Nix, *"Dixmoor 5" Sue Police, Claim Confessions Were Coerced*, Chicago Tribune (Oct. 18, 2012), https://perma.cc/69PB-U68M.

Chart 6: Jonathan Barr's Case



Had the Second Circuit's accrual rule been applied to Jonathan Barr's case, he would not have been able to seek damages for the over four years of wrongful detention before his 1997 wrongful conviction. That claim would have accrued at some point long before his criminal trial, and the statute of limitations would have expired while he was still incarcerated. Barr would thus have been worse off than an exoneree who spent the exact same total

number of years wrongly incarcerated, merely based on the date of his trial.

And had Barr prevailed at his 1997 criminal trial, it would have then been too late to sue the officers whose fabrication of evidence caused his four years of detention.

* * *

An innocent person facing criminal prosecution based on fabricated evidence is subject to an inexcusable deprivation of his constitutional rights. The Second Circuit's accrual rule places a remedy for that violation out of reach. The individual cannot know in advance of trial whether he will be convicted (in which case any future § 1983 fabrication claim would be *Heck* barred), or he will be acquitted (in which case any such claim may already be too late).

The practical result of this rule would be that some meritorious § 1983 fabrication claims would never get their day in court. That would only serve to compound the injustice affected exonerees endure. Officers who engaged in serious misconduct would not be held accountable. The deterrent effect of successful § 1983 suits create would be lost. And the public, over all, would be worse off.

CONCLUSION

The Second Circuit's accrual rule for § 1983 claims that fabricated evidence caused pretrial detention is inconsistent with the universally recognized accrual rule for § 1983 wrongful-conviction claims provided by *Heck v. Humphrey*. For all the

same reasons deferred accrual applies to § 1983 wrongful-conviction claims, the Court should adopt the same rule here. Additionally, the combination of the *Heck* rule with the Second Circuit's rule produces arbitrary and irrational disparities between otherwise similarly situated parties. This Court should reverse the Second Circuit and clarify that all § 1983 fabrication claims do not accrue until favorable termination of the relevant criminal proceedings.

March 4, 2019

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No. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in the proper interpretation of a law, like 42 U.S.C. § 1983, that was passed to protect the uniquely federal rights guaranteed by the Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Twice this Term, parties have asked this Court to resolve 42 U.S.C. § 1983 claims alleging the violation of a federal constitutional right by imposing the rules or elements of a specific common-law tort. In one case, this approach would favor the defendants. *See* Pet'rs Br. 42-48, *Nieves v. Bartlett*, No. 17-1174 (Aug. 20, 2018). Here, it would favor the plaintiff. *See* Pet'r Br. 19-30. In both cases, however, mechanically importing the components of an "analogous tort" into a Section 1983 claim would conflict with Section 1983's text, history, and purpose. This Court should

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

adopt the accrual rule sought by Petitioner, not because "the proper approach is to adopt the limitations rule from the most analogous common law tort," Pet'r Br. 19, but rather because the use of this accrual rule best comports with the nature of Petitioner's constitutional claim and Section 1983's purpose.

Respondent Youel Smith, a state prosecutor, allegedly fabricated evidence of criminal activity against Petitioner Edward McDonough and used this evidence in a pretrial investigation, in grand jury proceedings, and in two criminal trials. Pet'r Br. 2. Due to this malfeasance, McDonough was subject to prolonged criminal proceedings, an ordeal that ended only when his second trial resulted in an acquittal. *Id.* McDonough later sued Smith under Section 1983 for fabrication of evidence, which the court below regards as violating the Fifth and Fourteenth Amendment right to due process of law. Pet. App. 10a.

The gravamen of McDonough's claim is thus "the wrongful initiation and maintenance of criminal proceedings on the basis of fabricated evidence." Pet'r Br. 3. That wrong continued throughout both of his trials and ended only when his acquittal eliminated all prospect of further prosecution. Until that moment, McDonough suffered a continuous deprivation of liberty by virtue of being forced to stand trial. *Id.* at 40-41.

Despite that, the court below concluded that the violation and its harm were "complete" as soon as Smith's fabricated evidence was used against McDonough. Pet. App. 15a. At that point, according to the court, the statute of limitations on McDonough's constitutional claim began to run—meaning that the lawsuit he ultimately filed after his acquittal was untimely. *Id.* at 13a. The court reached this result by applying a "standard rule" of

accrual derived from the common law, under which "accrual occurs when a plaintiff has a complete and present cause of action," or, put another way, "once the plaintiff knows or has reason to know of the injury which is the basis of his action." *Id.* at 9a-10a (citation and quotation marks omitted).

The court below applied this "standard rule" reflexively—without considering the "refinement[s]" to this rule, *Wallace v. Kato*, 549 U.S. 384, 388 (2007), that the common law has developed for torts addressing concerns similar to Petitioner's constitutional claim. And as a result, the court failed to apply the rule that would best serve "the values and purposes of the constitutional right at issue." *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017).

After all, Section 1983 created a new remedy to vindicate the uniquely federal rights guaranteed by the federal Constitution against infringement by state officials. Enacted during Reconstruction as part of "extraordinary legislation," Cong. Globe, 42nd Cong., 1st Sess. 322 (1871) (hereinafter "Globe") (Rep. Stoughton), that "alter[ed] the relationship between the States and the Nation with respect to the protection of federally created rights," *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), Section 1983 was passed to provide "further safeguards" to "life, liberty, and property," Globe 374 (Rep. Lowe). To that end, it enabled individuals to seek damages in the federal courts for deprivations of rights "secured by the Constitution of the United States." Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

Critically, Section 1983 did not create "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, [and] malicious prosecution." *Rehberg v. Paulk*, 566

U.S. 356, 366 (2012). Instead, it furnished "a uniquely federal remedy" for incursions on "rights secured by the Constitution." *Wilson v. Garcia*, 471 U.S. 261, 271-72 (1985) (quoting *Mitchum*, 407 U.S. at 239).

Common-law principles, therefore, "are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Manuel*, 137 S. Ct. at 921 (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)). Thus, the procedural rules governing a particular tort are not to be reflexively imposed on a Section 1983 claim through "narrow analogies." *Owens v. Okure*, 488 U.S. 235, 248 (1989). Instead, when "applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.

Sometimes, of course, "the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules . . . directly to the § 1983 action." *Carey v. Piphus*, 435 U.S. 247, 258 (1978). This is such a case. Where, as here, fabricated evidence was the basis for criminal proceedings that deprived a victim of liberty, the rule that best fits the nature of this constitutional claim is that the statute of limitations begins running only when those proceedings have terminated. This rule also best serves Section 1983's goal of redressing and deterring constitutional violations in a uniform manner.

ARGUMENT

I. Section 1983 Is Meant To Vindicate the Unique Rights Guaranteed by the Federal Constitution, Not the Interests Protected by the Common Law of Torts.

Section 1983, which derives from the Civil Rights Act of 1871, was enacted to create "a private right of action to vindicate violations of rights, privileges, or immunities secured by the Constitution." *Rehberg*, 566 U.S. at 361 (quotation marks omitted). This Act, "along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era," *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982), which established "the role of the Federal Government as a guarantor of basic federal rights against state power," *Mitchum*, 407 U.S. at 239.

The text of what is now Section 1983 left no doubt about the new primacy of "federally secured rights." *Smith v. Wade*, 461 U.S. 30, 34 (1983). It gave any person who was deprived of "any rights, privileges, or immunities secured by the Constitution of the United States" the ability to hold the perpetrator liable, "any . . . law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." 17 Stat. 13; *see* Globe 692 (Sen. Edmunds) (the "solemn duty of Congress" is "to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him").

While the "specific historical catalyst" for this legislation "was the campaign of violence and deception in the South, fomented by the Ku Klux Klan," *Wilson*, 471 U.S. at 276; *see* Globe 158 (Sen. Sherman), Sec-

tion 1983 "'was not a remedy against the Klan or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law.'" *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973) (quoting *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961) (brackets omitted)). The fundamental problem that Congress sought to address, therefore, was not the prevalence of violent acts—the type of individual harms for which state tort law was designed to provide compensation. Rather, the problem was that Southern states, by tolerating this violence, were "permit[ing] the rights of citizens to be systematically trampled upon." Globe 375 (Rep. Lowe).

To address this problem, Section 1983 "interpose[d] the federal courts between the States and the people, as guardians of the people's *federal* rights." *Patsy*, 457 U.S. at 503 (quoting *Mitchum*, 407 U.S. at 242) (emphasis added); *see Carter*, 409 U.S. at 428 (Congress enacted Section 1983 to provide "indirect federal control over the unconstitutional actions of state officials"). Thus, while the violence inflicted on freedmen and their sympathizers "often resembled the torts of assault, battery, false imprisonment, and misrepresentation, § 1983 was not directed at the perpetrators of these deeds as much as at the state officials who tolerated and condoned them." *Owens*, 488 U.S. at 249 n.11.

Accordingly, "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 685 n.45 (1978). The statute "was designed to expose state and local officials to *a new form of liability*," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259

(1981) (emphasis added), by providing a remedy for "federally secured rights," *Smith*, 461 U.S. at 34, and would be "supplementary to any remedy any State might have," *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963). Regardless of what recourse state tort law might provide, "[p]roponents of the measure repeatedly argued that . . . an independent federal remedy was necessary." *Briscoe v. LaHue*, 460 U.S. 325, 338 (1983); *see* Globe 370 (Rep. Monroe) ("life, liberty, and property require *new guarantees* for their security" (emphasis added)).

In sum, Section 1983 provides "a uniquely federal remedy" for incursions upon "rights secured by the Constitution." *Wilson*, 471 U.S. at 271-72 (quoting *Mitchum*, 407 U.S. at 239). With full awareness that it was "altering the relationship between the States and the Nation with respect to the protection of federally created rights," Congress enacted Section 1983 to "protect *those* rights." *Mitchum*, 407 U.S. at 242 (emphasis added); *see* Br. of Constitutional Accountability Center at 5-10, *Nieves v. Bartlett*, No. 17-1174 (Oct. 9, 2018) (providing more detailed account of the history and purpose of Section 1983).

II. Common-Law Rules Are Borrowed To Fill in the Gaps of Section 1983 Only When Those Rules Help Fulfill the Statute's Purpose

A. While Section 1983 authorizes an "action at law," it lacks procedural details concerning the operation of this remedy. *See Wilson*, 471 U.S. at 266; *Owens*, 488 U.S. at 239. Thus, when a plaintiff alleges the violation of a constitutional right under Section 1983, courts "must determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel*, 137 S. Ct. at 920. This task,

however, is an act "of statutory construction." *Wood v. Strickland*, 420 U.S. 308, 316 (1975).[2]

As this Court has recognized, "Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). That conclusion is premised on the "important assumption . . . that members of the 42d Congress were familiar with common-law principles . . . and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport*, 453 U.S. at 258. Because Congress "borrowed general tort principles" in crafting Section 1983, *Heck v. Humphrey*, 512 U.S. 477, 484 n.4 (1994), this Court has often filled in the gaps of the statute with "federal rules conforming in general to common-law tort principles," *Wallace*, 549 U.S. at 388.

Crucially, however, "the Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more." *Rehberg*, 566 U.S. at 366. Instead, it has recognized that "[t]he new federal claim created by § 1983 differs in important ways from those pre-existing torts," most significantly in that "it reaches

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[2] In marked contrast to these procedural omissions, Section 1983 expressly specifies the federal interests it protects—which include, without limitation, "any rights . . . secured by the Constitution." 42 U.S.C. § 1983. On this point, the statute leaves no textual gaps to be filled. Therefore, courts may not shrink the range of constitutional rights protected by Section 1983 in an effort to mimic the scope of the interests protected by state tort law. *See* Br. of Constitutional Accountability Center, *Nieves v. Bartlett*, No. 17-1174 (Oct. 9, 2018).

constitutional and statutory violations that do not correspond to any previously known tort." *Id.* And because the statute has "no precise counterpart in state law," "any analogies to those causes of action are bound to be imperfect." *Id.* (quoting *Wilson*, 471 U.S. at 272).

Accordingly, while this Court "look[s] first to the common law of torts" when "defining the contours and prerequisites of a § 1983 claim," tort principles "are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Manuel*, 137 S. Ct. at 920-21 (quoting *Hartman*, 547 U.S. at 258). The rules governing particular causes of action, therefore, are not mechanically imposed on Section 1983 claims through "narrow analogies." *Owens*, 488 U.S. at 248. Instead, when "applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.

Reflecting those principles, this Court's approach has traditionally been to fashion "federal rules conforming *in general* to common-law tort principles," *Wallace*, 549 U.S. at 388 (emphasis added), by calling upon basic, fundamental, and broadly applicable principles of tort law. *See, e.g.*, *Monroe*, 365 U.S. at 187 (Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"). Reliance on such foundational principles makes sense because they are the ones that "members of the 42d Congress were familiar with" and "likely intended" to apply under Section 1983. *City of Newport*, 453 U.S. at 258; *see, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (legislator immunity "was taken as a mat-

ter of course by those who severed the Colonies from the Crown and founded our Nation"); *Briscoe*, 460 U.S. at 334 ("the common law's protection for witnesses is a tradition so well grounded in history and reason that we cannot believe that Congress impinged on it by covert inclusion in the general language before us" (citation and quotation marks omitted)); *Carey*, 435 U.S. at 254-55 ("[t]he cardinal principle of damages in Anglo-American law . . . hardly could have been foreign to the many lawyers in Congress in 1871" (citation and quotation marks omitted)).

Importantly, however, even when importing such foundational principles into Section 1983, this Court has not "mechanically duplicated" their "precise scope." *Rehberg*, 566 U.S. at 364; *see, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 340 (1986) ("while we look to the common law for guidance, we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form"); *Anderson v. Creighton*, 483 U.S. 635, 644-45 (1987) ("determinations as to the scope of official immunity are made in the light of the common-law tradition," but "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law" (citation and quotation marks omitted)).

That is because "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Carey*, 435 U.S. at 254. And critically, "the United States Constitution [and] traditional tort law . . . do not address the same concerns," *Daniels v. Williams*, 474 U.S. 327, 333 (1986), even when they prohibit similar conduct.

B. To be sure, sometimes "the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules . . . directly to the § 1983 action." *Carey*, 435 U.S. at 258. Indeed, this is such a case. *See infra*, Part III. "In other cases," however, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law torts." *Carey*, 435 U.S. at 258; *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971) ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile."); *Manuel*, 137 S. Ct. at 925 (Alito, J., dissenting) (citing "a severe mismatch" between the Fourth Amendment and the tort of malicious prosecution); *see also* Br. of Constitutional Accountability Center at 19-30, *Nieves v. Bartlett*, No. 17-1174 (Oct. 9, 2018) (explaining that the torts of false imprisonment and malicious prosecution protect different interests than the First Amendment's prohibition on retaliatory arrest).

Where constitutional requirements and the interests they protect do not neatly align with any particular common-law tort, "[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Carey*, 435 U.S. at 258. In a Section 1983 suit, after all, the question is not whether the defendant has breached a duty of care imposed by tort law, but rather whether he or she "has conformed to the requirements of the Federal

Constitution." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980).

"In order to further the purpose of § 1983," therefore, "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules . . . themselves were defined by the interests protected in the various branches of tort law." *Carey*, 435 U.S. at 258-59; *see Manuel*, 137 S. Ct. at 921. Because state common-law rules are not fashioned "with national interests in mind," the federal courts must ensure that any reliance on common law "will not frustrate or interfere with the implementation of national policies." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977).

C. Consistent with this circumscribed role for common-law rules, even when this Court determines that a particular rule may be appropriate to import into Section 1983, the Court does not do so without first considering "if § 1983's history or purpose counsel against applying it in § 1983 actions." *Wyatt v. Cole*, 504 U.S. 158, 164 (1992).

With respect to damages, for instance, the Court has explained that, in the absence of "specific guidance" from Section 1983's text and history, it "look[s] first to the common law of torts," but only "with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute." *Smith*, 461 U.S. at 34.

Similarly, with respect to immunities, even when this Court determines that "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes none-

theless counsel against recognizing the same immunity in § 1983 actions." *Malley*, 475 U.S. at 340 (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1984)). That is because "it would defeat the promise of the statute to recognize any preexisting immunity without determining . . . its compatibility with the purposes of § 1983." *City of Newport*, 453 U.S. at 259.

With respect to statutes of limitations, likewise, this Court has rejected yoking each specific type of Section 1983 action to a corresponding tort, recognizing that "[a]lmost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations." *Wilson*, 471 U.S. at 272-73. Instead, "a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose" by ensuring that, within each state, a single, predictable statute of limitations will apply. *Id.* at 272.

In sum, this Court consistently eschews reliance on "narrow analogies between § 1983 claims and state causes of action." *Owens*, 488 U.S. at 248. Because those causes of action reflect the concerns of traditional tort law and not the distinct concerns of the U.S. Constitution, *Daniels*, 474 U.S. at 333, this Court has not "mechanically duplicated" their contours under Section 1983, *Rehberg*, 566 U.S. at 364, even when looking to them "as a source of inspired examples," *Manuel*, 137 S. Ct. at 921 (quoting *Hartman*, 547 U.S. at 258).

III. To Advance the Goals of Section 1983, a Constitutional Claim that Fabricated Evidence Was Used To Initiate and Maintain Criminal Proceedings Should Accrue Only When Those Proceedings Have Terminated.

In the decision below, the court mechanically applied a general-purpose accrual rule derived from the common law of torts. Instead of doing so, the court should have first "considered" the "refinement[s]" to this rule that the common law has developed for torts that address concerns similar to Petitioner's constitutional claim. *Wallace*, 549 U.S. at 388. It then should have asked whether adopting any of those refinements would better serve "the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.

Applying that approach, the result is clear: when a plaintiff challenges "the initiation and maintenance of criminal proceedings based on fabricated evidence, and the resulting deprivation of his liberty," Pet'r Br. 4, the statute of limitations should begin running only when those proceedings have terminated. This rule, an application of the common-law concept of a continuing violation, best fits the nature of Petitioner's constitutional claim. Moreover, adopting that rule here best serves Section 1983's goal of redressing and deterring constitutional violations in a uniform manner.

A. The court below erred by applying a common-law accrual rule without analyzing whether this rule was a proper fit for the constitutional claim at issue.

The court began its analysis with a subtle, but crucial, misstatement of the law. It stated that federal courts "apply general common-law tort principles

to determine the accrual date of a [Section] 1983 claim." Pet. App. 9a (quoting *Spak v. Phillips*, 857 F.3d 458, 462 (2d Cir. 2017)); *see Spak*, 857 F.3d at 462 (citing *Wallace v. Kato* for this point). What this Court has actually said, however, is that federal courts should apply "federal rules conforming *in general* to common-law tort principles." *Wallace*, 549 U.S. at 388 (emphasis added). Behind that subtle difference in wording is a wide gulf in meaning.

The notion that courts should "apply general common-law tort principles," Pet. App. 9a, implies a wholesale adoption of those common-law principles, displacing any further consideration of the unique constitutional right at issue. But this Court's guidance makes clear that the procedural rules governing Section 1983 actions will conform only "in general" to the common law. *Wallace*, 549 U.S. at 388. That important caveat acknowledges what the court below did not: "In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question . . . ." *Carey*, 435 U.S. at 258-59; *accord Manuel*, 137 S. Ct. at 920-21.

This misstatement by the court below compromised its analysis. Instead of using common-law rules as "the appropriate *starting point* for the inquiry under § 1983," *Carey*, 435 U.S. at 258 (emphasis added), the court took those rules to be the end of that inquiry.

Under "the standard rule" for accrual, the court explained, "accrual occurs when a plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." Pet. App.

9a-10a. This rule derives from "common-law tort principles." *Wallace*, 549 U.S. at 388.[3] But the court never carried out the next step in the inquiry: assessing whether this standard rule was a proper fit for Petitioner's constitutional claim, or whether any "refinement" to the standard rule would better vindicate Section 1983's goals. *Cf. id.* at 384 ("There is, however, a refinement to be considered, arising from the common law's distinctive treatment of the torts of false arrest and false imprisonment . . . .").

To be sure, the court acknowledged, and rejected, Petitioner's analogy between fabrication of evidence and the tort of malicious prosecution. But its rejection of that analogy was premised on its assumption that the standard rule applied. *See* Pet. App. 13a (rejecting analogy because "the injury . . . occurs at the time the evidence is used against the defendant"). The court never wrestled with the threshold question of whether this standard rule, or some alternative, should be used when a Section 1983 plaintiff brings fabrication-of-evidence claims like Petitioner's.

By assuming that it should fill in the gaps of Section 1983 by simply plugging in "general common-law tort principles," Pet. App. 9a, the decision below failed to abide by this Court's precedents.

B. Petitioner, for his part, also advocates the wholesale adoption of a common-law rule. Instead of

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[3] *See also id.* (citing for this rule *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997)); *Bay Area Laundry*, 522 U.S. at 201 (citing for this rule *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)); *Rawlings*, 312 U.S. at 98 (citing for this rule *Holloway v. Morris*, 182 Ark. 1096, 1099 (1931)); *Holloway*, 182 Ark. at 1099 ("It is well settled that the statute of limitations does not begin to run in any case until there is a complete and present cause of action.").

pointing to general tort principles, however, he argues that "the proper approach is to adopt the limitations rule from the most analogous common law tort." Pet'r Br. 19.

Petitioner at times portrays *Wallace v. Kato* as demanding this approach, Pet'r Br. 19, and some courts have read *Wallace* that way. *See, e.g.*, *Devbrow v. Kalu*, 705 F.3d 765, 767 (7th Cir. 2013) ("we use the rule that applies to the common-law cause of action most similar to the kind of claim the plaintiff asserts" (citing *Wallace*, 549 U.S. at 388)); *Owens v. Balt. City State's Attorneys Office*, 767 F.3d 379, 391-92 (4th Cir. 2014) (same, rejecting argument that "the common law [is] merely the 'starting point' in resolving a statute-of-limitations question in a § 1983 action").

Wallace, however, does not call for inflexible reliance on whatever the nearest tort analog to a Section 1983 claim happens to be. While the decision firmly indicates that courts should "consider" any "distinctive rule[s]" of such torts when selecting the appropriate standard, *Wallace*, 549 U.S. at 389-90, its choice to borrow the rule of a particular tort rested on a determination that this rule served similar interests as the constitutional right at issue. Borrowing from that tort, therefore, would adequately serve the values and purposes of Section 1983.

In *Wallace*, defendants who were accused of an unconstitutional arrest urged this Court to apply the same "standard rule" for accrual that the court below applied here. This Court instead opted to apply the "distinctive rule" governing false imprisonment claims. *Id.* at 389. In doing so, the Court explained that the tort of false imprisonment protects similar interests as the Fourth Amendment's ban on unreasonable seizures:

> That tort provides the proper analogy to the cause of action asserted against the present respondents for the following reason: The sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*, and the allegations before us arise from respondents' detention of petitioner *without legal process* . . . .

Id. (citations omitted). Because the common-law rule and the relevant constitutional provision were both meant to remedy the same "sort" of injuries, this tort was a "proper analogy" for the constitutional claim. *Id.*

This Court also noted *why* the common law may have developed this distinctive rule for false imprisonment claims: "the reality that the victim may not be able to sue while he is still imprisoned." *Id.* That acknowledgement further underscored why it was appropriate to apply this rule to plaintiffs like the one in *Wallace*—plaintiffs who likewise may have been unable to sue while still imprisoned.

Petitioner also relies on this Court's decision in *Heck v. Humphrey*. But *Heck* does not call for mechanical reliance on the rules of an "analogous tort" any more than *Wallace* does. This Court there noted that "we look *first* to the common law of torts," which is "'the appropriate *starting point* for the inquiry under § 1983.'" *Heck*, 512 U.S. at 483 (quoting *Carey*, 435 U.S. at 257-58) (emphases added). After examining the elements of the tort of malicious prosecution, the Court adopted one of those elements—favorable termination of the criminal proceedings—as a requirement for similar constitutional claims.

Before doing so, however, the Court assured itself that malicious prosecution was indeed a proper anal-

ogy. Because this tort "permits damages for confinement imposed pursuant to legal process," including "compensation for any arrest or imprisonment," *id.* at 484, it closely matched the plaintiff's constitutional claims alleging abuse of the criminal process to arrest, try, and convict him, *id.* at 479.

The Court also made clear why borrowing the "favorable termination" rule from malicious prosecution would serve the purposes of federal law. That rule "avoids parallel litigation over the issues of probable cause and guilt," and it precludes "collateral attack[s] on the conviction through the vehicle of a civil suit." *Id.* at 484 (citation and quotation marks omitted). These attributes were especially significant in *Heck* because there the Court had to reconcile Section 1983 with the federal habeas corpus statute. *Id.* at 480-81. By exploring "the common-law principle barring tort plaintiffs from mounting collateral attacks on their outstanding criminal convictions," this Court confirmed its belief that Section 1983, "which borrowed general tort principles, was not meant to permit such collateral attack," leaving "habeas corpus [as] the exclusive remedy" for such challenges. *Id.* at 485 n.4, 481.

Heck and *Wallace*, therefore, do not endorse a reflexive adoption of the rules or elements of whatever tort happens to be most analogous to a plaintiff's constitutional claim. Embedded in both decisions was a determination that the constitutional claim at issue truly was analogous to the specific tort from which the Court borrowed, and that applying this tort's rules would further the purposes of Section 1983.

Any doubt or ambiguity on this score has been removed by this Court's subsequent decisions, which reemphasize that Section 1983 is not "a federalized amalgamation of pre-existing common-law claims,"

Rehberg, 566 U.S. at 366, that "any analogies to those causes of action are bound to be imperfect," *id.*, and that, as a result, "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims," *Manuel*, 137 S. Ct. at 921.

This more nuanced interpretation of *Heck* and *Wallace* also helps ensure the consistency of those decisions with the remainder of this Court's precedent—which has always recognized Section 1983's role as a remedy for uniquely *federal* rights. It is "the purest coincidence" when the common law seeks to protect comparable rights. *Rehberg*, 566 U.S. at 366 (quoting *Wilson*, 471 U.S. at 272). The efficacy of Section 1983 in vindicating constitutional rights cannot hinge on the luck of whether state tort law happens to address similar interests. Indeed, it is precisely where state law is lacking in this regard that Section 1983's remedy is *most* essential.

C. The court below should not, therefore, have "simply adopt[ed] the limitations rule applicable to the most analogous common law tort." Pet'r Br. 2. But neither should the court have applied a "standard rule" of accrual, Pet. App. 9a, without "closely attend[ing] to the values and purposes of the constitutional right at issue," *Manuel*, 137 S. Ct. at 921. Instead, the court should have considered whether any refinements to that standard rule were a better fit for Petitioner's constitutional claim. And that analysis supports the rule sought by Petitioner: a constitutional claim that fabricated evidence was used to initiate and maintain criminal proceedings should not accrue until those proceedings terminate.

Although the standard rule under common-law tort principles is that a limitations period begins "when the plaintiff has a complete and present cause of action," *Wallace*, 549 U.S. at 388, the common law

also recognizes that certain wrongs constitute *continuing violations*. And those violations are governed by a different rule.

The tort of false imprisonment, for instance, "does not consist in a single act, but in a prolonged or continuous violation of personal liberty." 1 Francis Hilliard, *The Law of Torts or Private Wrongs* 200 (3d ed. 1866); *see id.* ("an officer, who illegally imprisons a person, is liable not only for the time he is in the officer's custody, but for all the time of the imprisonment"). Accordingly, "[t]he running of the statute of limitations on false imprisonment is subject to a distinctive rule," commencing only "'when the alleged false imprisonment ends.'" *Wallace*, 549 U.S. at 389 (quoting 2 H.G. Wood, *Limitation of Actions* § 187d(4), at 878 (rev. 4th ed. 1916)). This Court borrowed that distinctive rule in *Wallace* after finding it better suited to the nature of the plaintiff's constitutional claim. *See supra* at 17-18.

The same principle applies here. An official's fabrication of evidence to initiate and maintain criminal proceedings is an ongoing wrong from which the victim is not free until the proceedings have completely terminated. *See* Pet'r Br. 44-50. Just as "[t]he wrong of detention without probable cause continues for the duration of the detention," *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018), here too the wrong continued for the duration of Petitioner's trial and retrial. As the court below acknowledged, "[t]he constitutional right violated by fabricated evidence is the right not to . . . face trial based on such evidence." Pet. App. 14a-15a. Petitioner continued to face trial, and thus was deprived of his constitutional rights, until his acquittal ended all prospect of further prosecution. Until that point, he endured "a prolonged or continuous violation of person-

al liberty." 1 Hilliard, *supra*, at 200; *cf.* Pet. App. 10a (acknowledging that Petitioner "suffered a liberty deprivation because of [fabricated] evidence when he . . . stood trial").

Resisting that conclusion, the court below insisted that Respondent's wrongful acts were "complete" as soon as the fabricated evidence was used against Petitioner. Pet. App. 15a. By "complete," the court seems to have meant that Petitioner by then had been legally harmed and was thus entitled to sue. *See id.* But as *Wallace* illustrates, that is not the only consideration. The mere fact that a wrong has *begun* to injure its victim does not mean that the wrong has *ended*. In *Wallace*, after all, the plaintiff "was injured and suffered damages at the moment of his arrest, and was entitled to bring suit at that time," 549 U.S. at 390 n.3, yet the violation did not end—and his claim did not accrue—until later, when he was no longer held without legal process, *id.* at 391.

Respondent's unconstitutional acts were therefore not "complete" at the moment he used fabricated evidence in a way that injured Petitioner. That evidence led to the instigation and the continuation of criminal proceedings. The violation ended only when Petitioner was no longer in legal jeopardy, and thus no longer being deprived of his liberty. "When a wrong is ongoing rather than discrete," as here, "the period of limitations does not commence until the wrong ends." *Manuel*, 903 F.3d at 669.

Borrowing the distinctive accrual rule for continuing violations is appropriate regardless of whether false imprisonment, malicious prosecution, or some other tort is "the closest common law analog" to Petitioner's claim. Pet'r Br. 3. The function of the common law here is to provide "a source of inspired examples." *Manuel*, 137 S. Ct. at 921. Because the con-

tinuation of Petitioner's criminal proceedings based on fabricated evidence was an ongoing violation, akin to the continuation of a false imprisonment, it is proper to draw upon the example of false imprisonment's distinctive accrual rule.

After all, while false imprisonment and malicious prosecution are separate causes of action, the two are "related." *Heck*, 512 U.S. at 484; *see generally* Martin L. Newell, *A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* (1892).[4] Together with their variants, these torts formed "a particular branch of the common law," *Carey*, 435 U.S. at 258, addressing the harms that ensue from deprivations of liberty inflicted with inadequate or tainted legal process. *See* Newell, *supra*, § 7, at 9 ("An action will lie against one who has either unlawfully arrested or imprisoned another, or who has falsely, that is unjustly and maliciously, prosecuted him and caused his arrest."). And those harms resemble the harms that the Constitution guards against by prohibiting the use of fabricated evidence in criminal proceedings. *See* Pet. App. 10a ("Under the Fifth and Fourteenth Amendments' Due Process Clauses, individuals have 'the right not to be

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[4] Illustrating the fluid spectrum between these torts, one of their variants, sometimes called "malicious arrest," consisted of making false representations to obtain a judicial order for the arrest and detainment of another person, such as an alleged debtor. *See* 2 C.G. Addison, *A Treatise on the Law of Torts* § 870, at 83 (H.G. Wood ed., 1881); *Ahern v. Collins*, 39 Mo. 145, 150 (1866); *Herman v. Brookerhoff*, 8 Watts 240, 241 (Pa. 1839); *Hogg v. Pinckney*, 16 S.C. 387, 392 (1882). And in suits for malicious arrest, just like in suits for malicious prosecution, courts held that "[t]he new action must not be brought before the first be determined; because till then it cannot appear that the first was unjust." *Cardival v. Smith*, 109 Mass. 158, 158 (1872); *Hogg*, 16 S.C. at 396.

deprived of liberty as a result of the fabrication of evidence by a government officer . . . ." (quoting *Zahrey v. Coffey*, 221 F.3d 342, 349 (2d Cir. 2000))). One need not cast about for a "most" analogous tort, therefore, to conclude that the deferred-accrual rule can, and should, be borrowed in the process of "applying, selecting among, or adjusting common-law approaches" here—a process centered around "the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.

Indeed, considering the similar accrual rule for the tort of malicious prosecution points in the same direction. As Petitioner emphasizes, such claims do not accrue until the allegedly malicious prosecution has terminated in the plaintiff's favor. This rule, whatever its original rationale, ensures that accrual is deferred as long as a victim remains threatened by the baseless prosecution he seeks to challenge—that is, as long as "the prosecution is persisted in and kept hanging over the head of the plaintiff." 2 Addison, *supra*, § 852, at 65; *see Cardival*, 109 Mass. at 158-59 (in malicious prosecution, "an acquittal by a jury must be shown," and "a *nolle prosequi* entered by the attorney for the government is not sufficient; for . . . another indictment may still be found on the same complaint").

Notably, a person could traditionally be liable for malicious prosecution if he "continued" a criminal proceeding that was initiated by another person without his participation. 2 Addison, *supra*, §§ 857, 872, at 76, 85; 1 Hilliard, *supra*, at 426 ("one may be liable for the continuance of a prosecution, after notice of it, though not commenced by him"); Thomas M. Cooley, *A Treatise on the Law of Torts* 187 (1879) (a witness giving false evidence who was not involved in the decision to commence prosecution can be held lia-

ble if "he interferes improperly afterwards"); *Finley v. St. Louis Refrigerator Co.*, 99 Mo. 559, 13 S.W. 87, 88 (1890) ("[I]t was not vital to plaintiff's recovery that he should show that defendants commenced *and* continued the prosecution maliciously. If he proved that it was *either* so commenced *or* continued by them, it would be sufficient to support his case . . . ." (emphasis added)). As this rule illustrates, a malicious prosecution violation continues throughout the pendency of the prosecution. As such, its accrual rule dovetails with the rule for false imprisonment: so long as a plaintiff's liberty is still being infringed—whether by an unauthorized confinement or by the need to face spurious criminal charges—the statute of limitations does not begin running.[5]

Together, the accrual rules of false imprisonment and malicious prosecution form a distinct alternative to the "standard" rule embraced by the court below. And that alternative provides a better fit for Petitioner's constitutional claim.

D. In addition, applying this alternative rule better serves the "chief goals" of Section 1983, "compensation and deterrence." *Hardin v. Straub*, 490 U.S. 536, 539 (1989); *cf. Burnett v. Grattan*, 468 U.S. 42,

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[5] The court below attempted to distinguish malicious prosecution by stating that "the harm—and the due process violation—is in the *use* of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding." Pet. App. 13a. While that is true, malicious prosecution is no different. After all, malicious prosecution is entirely focused on the *wrongful initiation* of legal proceedings. *See, e.g., Herman*, 8 Watts at 241 ("The gist of the action . . . is the origination of a malicious and groundless prosecution, which *ipso facto* put the party in peril."). Despite the fact that *instigating* a prosecution is the legal wrong, accrual is deferred so long as the party remains "in peril." *Id.*

55 (1984) ("the central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief"). Without this rule, many victims of fabricated evidence will see their causes of action accrue during, or even before, their criminal trials. Forcing such individuals to sue then, or not at all, will inevitably discourage meritorious claims. *See* Pet'r Br. 55-56.

To be sure, the goal of Section 1983 is not simply to allow the most plaintiffs to sue. *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978) ("If success of the § 1983 action were the only benchmark, . . . the appropriate rule would then always be the one favoring the plaintiff . . . ."). But here, without a rule deferring accrual until termination, valid claims of constitutional violations will be discouraged for reasons that do not promote any of the statute's goals. Quite the contrary: the very reason individuals may be afraid to file suit against an offending state official is that they are still at risk of suffering the dire legal consequences of that official's malfeasance. *Cf.* Pet'r Br. 2 (noting that it was Respondent's choice whether or not to try Petitioner a second time). Sanctioning this perverse result would be entirely contrary to "the settled § 1983 policy of deterring officials' unconstitutional behavior." *Hardin*, 490 U.S. at 542.

"There is, of course, a federal interest in disposing of all litigation in the federal courts as expeditiously as possible," but that interest "is vindicated by all statutes of limitations and always must be balanced against the countervailing interest in allowing valid claims to be determined on their merits." *Id.* at 542 n.10; *see Wilson*, 471 U.S. at 272 (adopting an interpretation of Section 1983 that "best fits the stat-

ute's remedial purpose"); *Owen*, 445 U.S. at 636 (the Forty-Second Congress anticipated that Section 1983 would be interpreted broadly to promote its remedial goals).

A deferred-accrual rule is also appropriate here because it promotes "uniformity," one of Section 1983's "subsidiary goals." *Hardin*, 490 U.S. at 539. Under this rule, fabrication-of-evidence claims will never accrue before the relevant criminal proceedings have terminated, and in most cases they will accrue upon termination. (Exceptions may arise where a plaintiff had no way of knowing about the fabricated evidence until later.) By reducing the number of scenarios in which accrual dates hinge on a plaintiff's awareness, or presumed awareness, of a violation, this rule offers greater predictability. A standard accrual date that in most cases cannot seriously be challenged will minimize the "uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983." *Wilson*, 471 U.S. at 272.

* * *

Some cases present difficult choices between promoting the breadth of Section 1983's remedy, ensuring uniformity, and hewing to the common-law principles on which the statute was modeled. Not this case. Here, all three imperatives call for the same result. This Court can borrow a traditional common-law rule, employ that rule in service of protecting constitutional rights, and in the process make the law's application simpler and more predictable. And it can accomplish all this by reaffirming and applying established principles. The Court should do so.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CRIMINAL DEFENSE ORGANIZATIONS, CIVIL RIGHTS ORGANIZATIONS, AND THE CATO INSTITUTE AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE**

Amici curiae Brooklyn Defender Services, The Legal Aid Society, New York County Defender Services, Neighborhood Defender Service of Harlem, Center for Appellate Litigation, Appellate Advocates, Vermont's Office of the Defender General, and the New York State Association of Criminal Defense Lawyers provide criminal defense and related representation in the Second Circuit to the individuals that will be directly impacted by the decision below—innocent people prosecuted for crimes based on fabricated evidence. They are joined by fellow *amici curiae* the Cato Institute, National Association of Criminal Defense Lawyers (NACDL), National Police Accountability Project (NPAP), Southern Poverty Law Center (SPLC), Association of Criminal Defense Lawyers of New Jersey, California Attorneys for Criminal Justice, and New Mexico Criminal Defense Lawyers Association—leading criminal defense and civil rights organizations outside of the Second Circuit that defend civil liberties, the rights of persons accused of crimes, and the interests of wrongfully convicted persons in asserting their constitutional rights.

Amici share the same fundamental concern with the rule announced by the court below: It imposes an

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* Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

unfair and unworkable burden on individuals exercising fundamental rights, has enormous consequences for the orderly administration of justice, and is divorced from the realities of criminal litigation. This Court should definitively establish that the limitations period for § 1983 fabrication-of-evidence claims does not begin to run until the termination of criminal proceedings and thereby restore uniformity to federal law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The statute of limitations for a claim for the unlawful fabrication of evidence under 42 U.S.C. § 1983 should not begin to run until after a criminal prosecution concludes. That rule flows directly from this Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994), which held that claims analogous to evidence-fabrication claims should be brought after the termination of criminal proceedings. It also conforms to the Court's broader pronouncements about the appropriate relationship between federal civil and state criminal litigation. This Court has consistently held that federal civil litigation should come after the conclusion of state criminal proceedings, both to respect the prerogative of states to adjudicate alleged violations of state law and to bolster the strong judicial policy against inconsistent adjudications in parallel proceedings.

A bright-line rule that fabrication-of-evidence claims accrue only after the termination of criminal proceedings is also far more administrable than the rule announced below. The decision below held that the statute of limitations for unlawful fabrication of evidence under 42 U.S.C. § 1983 begins running when the individual "learned of the fabrication of the

evidence and its use against him in criminal proceedings," and "was deprived of a liberty interest by," for example, an arrest or trial. *McDonough v. Smith*, 898 F.3d 259, 267 (2d Cir. 2018). That rule is confusing and almost impossible to administer. No one knows what it means for a criminal defendant to have "learned of the fabrication of the evidence and its use against him in criminal proceedings." It is unclear, for example, whether attempting to impeach a witness, questioning evidence's chain of custody, moving to suppress tainted evidence, or suggesting that the prosecution's case just doesn't add up would constitute sufficient "knowledge" to start the statute of limitations running. Accrual rules should be clear. The Second Circuit's rule is anything but.

Moreover, any pre-termination accrual rule, such as the rule announced below, risks forcing criminal defendants to mount § 1983 suits—and prosecutors and officers to defend against them—either during a pending criminal trial or while still pursuing its appeal. The Court should view any rule that would require criminal defendants to bring civil suits demanding remedy for actions directly related to pending criminal cases during the pendency of the criminal proceedings with deepest suspicion.

Such an accrues-during-prosecution rule would ignore the practical realities of criminal defense and civil rights litigation. It would force an innocent defendant to make a Hobson's Choice. He could remain silent and hold the state to its fabricated proof—as is his absolute constitutional right—but in doing so risk losing his civil claim. Or he could demand a remedy for the fabrication—as is also his absolute constitutional right—but in doing so add a confusing, potentially prejudicial element to the criminal pro-

ceedings. A criminal defense lawyer would not advise a client to bring a parallel civil rights claim during his criminal proceedings that could jeopardize rights that are constitutionally guaranteed to criminal defendants, such as the right to hold the prosecution to their burden of proof beyond a reasonable doubt, and to present testimony only after the prosecution's case is submitted, or not at all. And prosecutors facing civil suits alleging misconduct by their offices (or by other law enforcement officers with whom they work regularly) would be less likely to dismiss weak cases and more likely to pursue convictions, if only to protect law enforcement officials—and the jurisdictions that elected them—against the civil suit.

The § 1983 suit itself would also prejudice the criminal defendant. Allegations in the civil complaint would require the defendant to divulge all the facts and details known to him before the prosecution presents its case and carries its burden and would unleash the broad rules of civil discovery, thereby critically imperiling the defendant's absolute right to remain silent during the criminal proceeding and require the state to prove its case beyond a reasonable doubt.

An accrues-during-prosecution rule would also have crushing practical consequences. Knowing use of fabricated evidence to bring about the conviction of a criminal defendant is among the most serious misconduct anyone in the criminal justice system can commit. It is also a disturbingly common cause of wrongful convictions. Statistics, anecdotes, cases, and *amici*'s own experience show just how widespread the problem of evidence fabrication is. A rule that would force defendants to sue during the pending criminal proceedings would mean that a devas-

tating number of meritorious fabrication-of-evidence claims will never see the light of day. In the Second Circuit alone, countless criminal defendants, along with *amici* who defend and fight for them, would suffer from the fallout of such a rule.

ARGUMENT

I. An Accrual Rule that Turns on the "Awareness of the Evidence and Its Improper Use" Is Confusing and Unworkable

A. The Rule Fails to Provide Clear Guidance to Plaintiffs and Is Unworkable

The Second Circuit applied "standard accrual rules" to hold that a fabrication-of-evidence claim accrues when a plaintiff becomes "aware of th[e] tainted evidence and its improper use." *McDonough*, 898 F.3d at 266-67. As petitioner explains, the court's application of the "standard" rules was not just wrong on its own terms—the court should not have applied them at all. Pet. Br. 19-30. This Court has cautioned that practical considerations may render standard accrual rules inappropriate for certain claims. *See Wallace v. Kato*, 549 U.S. 384, 388-89 (2007) (noting, for instance, the "distinctive rule" for false imprisonment claims given "the reality that the victim may not be able to sue while he is still imprisoned"). That is particularly true here, where the Second Circuit adopted an accrual rule that is confusing and unworkable in the real world.

The Second Circuit's "awareness rule" fails to provide meaningful guidance on when a fabrication claim actually accrues in most criminal cases. Criminal defendants are often "aware of th[e] tainted evidence" as soon as it is used against them, *McDonough*, 898 F.3d at 267, but may not know

whether the tainted evidence was deliberately fabricated by a government official until much later. The degree of "awareness" required under the accrual rule adopted below is unclear. Many plaintiffs will respond to this uncertainty by filing fabrication claims prematurely, with insufficient information, to avoid their claims being time-barred. And in so doing they heighten the risk that their otherwise meritorious claims will be dismissed.

This concern is especially salient for one of the most pervasive forms of fabricated evidence: false testimony. *See generally* Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 Penn St. L. Rev. 331 (2011); Joseph Goldstein, *"Testilying" by Police: A Stubborn Problem*, N.Y. Times (Mar. 18, 2018), http://perma.cc/KUC9-XCMU. A criminal defendant may know right away that a witness' account tying him to the scene of the crime is false. But false testimony is not always the product of bad faith by law enforcement officials. *See* Poulin, *supra*, at 346-48. Often times it is the witness who has lied—or simply misremembered. *See id.*; *Smalls v. City of New York*, 181 F. Supp. 3d 178, 186-87 (E.D.N.Y. 2016). An accrual rule that turns on awareness of tainted evidence fails to account for these nuances, and will compel confused plaintiffs to file evidence-fabrication claims based on incomplete information.

Additionally, to the extent the rule adopted below starts the clock before plaintiffs even know the identity of the fabricator, it is simply unworkable. *See McDonough*, 898 F.3d at 267 (suggesting that McDonough's evidence fabrication claim accrued as soon as he was "indicted and arrested"). A substantial amount of time often passes before a defendant

realizes that tainted evidence was fabricated by a government official[1]—an amount that can easily exceed the time allowed by the applicable statute of limitations. While courts may theoretically toll the statute of limitations on an equitable basis, this Court has long understood that "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace*, 549 U.S. at 396.

In a recent § 1983 evidence fabrication suit, for example, more than a decade elapsed before plaintiffs learned the identity of the fabricator. *See Serrano v. Guevara*, 315 F. Supp. 3d 1026, 1032-33 (N.D. Ill. 2018). *Serrano* involved two detectives who were unable to solve a murder and "decided to frame three Latino men with histories of armed robberies to close the case." *Id.* at 1032. The detectives did so by using physical coercion to suborn false testimony from a recent arrestee suffering from the effects of heroin withdrawal. *Id.* The arrestee proceeded to falsely testify that he encountered the plaintiffs carrying a weapon on the day of the murder and that they had admitted to the crime. *Id.*; *see People v. Serrano*, 55 N.E.3d 285, 289 (Ill. App. Ct. 2016). The plaintiffs, who had nothing to do with the murder, would have known that the testimony was false as soon as it was introduced. But they did not learn that government

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[1] This is especially true in jurisdictions like New York, where restrictive criminal discovery laws allow prosecutors to withhold almost every piece of relevant evidence they intend to use at trial—including police reports, witness statements, and other documents—until a suppression hearing is conducted or a jury sworn. *See* N.Y. Crim. Proc. Law §§ 240.44, .45.

officials were involved in the fabrication until the witness recanted eleven years later during post-conviction proceedings. *See Serrano*, 315 F. Supp. 3d at 1033.

The confusion caused by the awareness rule does not end with concerns over the degree of actual knowledge required to start the clock. Under the rule adopted below, an evidence fabrication claim also accrues when a plaintiff *should have known* of the improper use of tainted evidence. *McDonough*, 898 F.3d at 264, 266. "In determining what a plaintiff should have known, [courts] ask what facts a reasonably diligent plaintiff would have discovered." *Gabelli v. SEC*, 568 U.S. 442, 452 (2013) (internal quotation omitted). But it is unclear what investigatory efforts can be expected of a "reasonably diligent plaintiff" who is also a defendant in an active criminal proceeding—particularly in states with especially restrictive criminal discovery laws, like New York. The rule adopted below provides no guidance to plaintiffs, and the very question belies the rule's logic: It is not reasonable to expect a plaintiff to investigate facts that would form the basis of a fabrication claim while simultaneously defending against a criminal prosecution that follows from the fabrication. *See infra* Part II. The Court should thus reject any rule under which a fabrication claim accrues prior to the termination of criminal proceedings.

B. The Awareness Rule is Inconsistent with Most Other Accrual Rules for Claims Stemming from Prosecutorial Misconduct and Will Encourage Piecemeal Litigation

The Second Circuit's "awareness rule" for evidence fabrication claims is plainly at odds with accrual rules for other § 1983 claims that involve mis-

conduct by law enforcement officials during criminal proceedings. Such claims generally do not accrue until after criminal proceedings have terminated, regardless of when a plaintiff knows or should have known of the existence of a cause of action.

For example, § 1983 claims alleging that a prosecutor has withheld exculpatory evidence from the defendant, *see Brady v. Maryland*, 373 U.S. 83 (1963), accrue only after the termination of criminal proceedings. *See Poventud v. City of New York*, 750 F.3d 121, 132-34 (2d Cir. 2014) (en banc); *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 390 (4th Cir. 2014). The same is true of § 1983 claims alleging that the state failed to disclose evidence that might impeach the credibility of the state's own witnesses, as required by *Giglio v. United States*, 405 U.S. 150 (1972). *See Rosales-Martinez v. Palmer*, 753 F.3d 890, 896 (9th Cir. 2014). Malicious prosecution claims under § 1983, too, must wait until the conclusion of criminal proceedings. *See Lanning v. City of Glens Falls*, 908 F.3d 19, 24-29 (2d Cir. 2018). The same goes for claims of intentional infliction of emotional distress based on wrongful convictions. *See Serrano*, 315 F. Supp. 3d at 1043.

Section 1983 plaintiffs often bring fabrication claims alongside one or more of the above claims that accrue post-termination. *See, e.g.*, *McDonough*, 898 F.3d at 264 (alleging evidence fabrication and malicious prosecution); *Halsey v. Pfeiffer*, 750 F.3d 273, 278-79 (3d Cir. 2014) (same); *Cairel v. Alderden*, 821 F.3d 823, 827 (7th Cir. 2016) (alleging evidence fabrication and *Brady* violation); *Massey v. Ojanliit*, 759 F.3d 343, 347 (4th Cir. 2014) (alleging evidence fabrication and false imprisonment); *Jeanty v. City of Utica*, 2017 WL 6408878, at *2 (N.D.N.Y. Aug. 18,

2017) (alleging evidence fabrication and *Giglio* violation); *Serrano*, 315 F. Supp. 3d at 1034, 1042 (alleging evidence fabrication and intentional infliction of emotion distress).

Dissonant accrual rules will force plaintiffs to bring such claims separately, leading to "piecemeal litigation" that wastes the time and resources of litigants and courts alike. *See Panetti v. Quarterman*, 551 U.S. 930, 946 (2007). Such piecemeal litigation also risks the possibility of divergent outcomes on claims arising from the same occurrence, thereby undermining public confidence in the justice system. This Court has long recognized "the desirability of avoiding piecemeal litigation," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976), and can do so here by adopting consistent accrual rules for claims stemming from allegations of government misconduct in criminal prosecutions.

II. Any Rule that Encourages Litigants to File § 1983 Lawsuits During Pending Criminal Proceedings Is Divorced from the Realities of Criminal Litigation

Given the massive liberty interest at stake in criminal cases, a defense attorney would rarely advise his client to file a concurrent § 1983 fabrication-of-evidence claim while the criminal case is ongoing. Parallel litigation threatens to undermine the defendant's Fifth Amendment privileges, inappropriately expand discovery, expose the basis of the defense to the prosecution in advance of criminal trial , or otherwise prejudice the case. *See SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980). Yet, a rule that begins running the statute of limitations *during* a pending prosecution would require that criminal defendants in many cases do just that,

or else forfeit their claims. These risks are unnecessary and unfair, and serve no real countervailing state interest. They are also easily avoided by the bright-line rule adopted in the Third, Fifth, Sixth, Ninth, and Tenth Circuits.

A. Filing a § 1983 Claim During a Criminal Prosecution Incentivizes the Prosecutor to Secure a Conviction

Prosecutors understand that a conviction generally *Heck*-bars parallel civil claims and thus shields state officials from potential liability for any conduct during the criminal proceedings. Thus, commencing a § 1983 civil action for fabrication of evidence while a criminal case is still pending would encourage prosecutors to resist dismissals, insist on guilty pleas, and make them less willing to concede that a case lacks strong evidentiary support or merit.

Prosecutors protecting their jurisdictions and law enforcement officers from § 1983 fabrication-of-evidence suits may more forcefully pursue a conviction in the still-ongoing criminal proceeding. That risk is particularly salient in light of prosecutors' immense discretion and the nature of plea bargaining in the modern criminal justice system. Prosecutors are the system's most powerful actors. They have nearly unfettered discretion in making charging decisions, negotiating plea agreements, and dismissing cases. A criminal defendant's position in plea bargaining is naturally precarious given the wide discretion prosecutors may exercise. Thus, the potential risk of less leniency—or bad faith—in the bargaining process is enough to discourage some defendants from filing meritorious § 1983 claims while their criminal case remains pending. Given that plea bargaining is the presumptive path in a crimi-

nal proceeding, an accrues-during-prosecution rule could effectively prevent the vast majority of criminal defendants from ever bringing meritorious § 1983 misconduct cases.

Ideally, prosecutors should not abuse the broad discretion they are afforded, but instead should negotiate in good faith to achieve just and equitable outcomes. But the filing of a parallel civil § 1983 claim injects an inappropriate factor into the many discretionary decisions prosecutors make throughout a criminal case—including those regarding bail recommendations, appropriate charging, plea offers, and trial readiness. It focuses prosecutors on avoiding potential liability for their law-enforcement colleagues and their cities or towns, rather than bargaining in good faith to accomplish a just result. Indeed, in cases with obvious indicia of law enforcement misconduct—for example, a visibly brutalized defendant arraigned on a stand-alone "resisting arrest" charge—many prosecutors in *amici*'s jurisdictions already assume a liability-protective stance from the outset and, knowing civil suit is likely, refuse to dismiss or plea bargain. The mere specter, then, of civil liability, even without the forced filings contemplated by an accrues-during-prosecution rule, introduces an improper factor to criminal dispositions. The deluge of civil filings that would be unleashed by an accrues-during-prosecution rule would introduce this improper factor to thousands of new cases—delaying those criminal proceedings, falsely incentivizing prosecutors to pursue weak cases, and unnecessarily flooding the federal courts with civil claims that are unripe and possibly *Heck*-barred.

B. Because of the Breadth of Civil Discovery, Parallel Civil and Criminal Litigation Harms Defendants

An accrues-during-prosecution rule does not account for the challenge of conducting contemporaneous civil and criminal discovery—a challenge faced by both the government and the defendant.

Civil discovery is extremely broad in scope. It "requires nearly total mutual disclosure of each party's evidence prior to trial." *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1203 (Fed. Cir. 1987). Rule 26 permits broad discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case ... information within this scope of discovery need not be admissible to be discoverable." Fed. R. Civ. P. 26(b)(1). In contrast, discoverable materials are described with specificity and detail in the criminal context. *See* Fed. R. Crim. P. 16.

One broad divergence between civil and criminal discovery is in the ability to conduct depositions. In the criminal context, a party is permitted to depose only its own witnesses, and only pursuant to a court order in "exceptional circumstances." Fed. R. Crim. P. 15(a). By contrast, civil discovery rules allow depositions of any person whose testimony would be relevant to the subject of the action—including the accused plaintiff. *See* Fed. R. Civ. P. 26. To establish a § 1983 fabrication-of-evidence claim then, accused plaintiffs must effectively give up the right to remain silent and be deposed—inverting the burden of proof—in order to make out a cognizable legal claim. There is no doubt that an accused plaintiff or his witnesses should not be the subject of a civil deposition regarding what they know about purported evi-

dence against him, and how they know it, when the plaintiff is simultaneously facing criminal charges based on the same evidence. An accrues-during-prosecution rule is thus at odds with the structure, goals, and constitutional guarantees of the criminal justice system, placing an accused plaintiff in an unnecessary bind as he navigates civil discovery while defending an open criminal case.

In addition, the government has the power in the civil action to serve interrogatories and requests for admission to the criminal defendant. *See* Fed. R. Civ. P. 33, 36. These requested disclosures may be related to any matter within the broad scope of civil discovery. Under the accrues-during-prosecution rule, criminal defendants would be required to submit written responses to these requests in the civil action while their criminal case remain ongoing. This may include interrogatories specifically seeking the defendant's opinion or contention that relates to a fact relevant in their criminal case. There is no parallel mechanism in the criminal context that would require a defendant to prepare written responses to questions from the government. The ability of the government to seek written disclosures in the civil action is therefore extremely prejudicial to the defendant's criminal case and has obvious implications for the defendant's Fifth Amendment privileges.

The ability to subpoena third parties is also vastly expanded in the civil context. Rule 17 of the Federal Rules of Criminal Procedure, which outlines the use of subpoenas, "was not intended to provide additional means of discovery"; rather, the Rule's "chief innovation was to expedite the trial by providing a time and place before trial for inspection of the sub-

poenaed materials." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951). In criminal cases, subpoenas are authorized only if the moving party can show: "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" *United States v. Nixon*, 418 U.S. 683, 699-700 (1974). In contrast, this heightened showing is not required in the civil context, where subpoena power is far-reaching. *See* Fed. R. Civ. P. 45(a)(1)(A)(iii) (a subpoena may command attendance at a deposition; production of documents, electronically stored information, or tangible things; and inspection of premises).

Under an accrues-during-prosecution rule, wherein a § 1983 claim must be filed before the conclusion of criminal process, the government could use its subpoena powers in the parallel civil action to access confidential, potentially privileged information from third parties that it otherwise would have no ability to retrieve in the criminal case. This could include information such as education records, employment history, and medical records—all of which may have the potential to prejudice the defendant in his ongoing criminal case.

Nothing in the law requires that a court postpone civil discovery or otherwise stay civil proceedings until the termination of the parallel criminal proceeding. *See Mid-America's Process Serv. v. Ellison*, 767

F.2d 684, 687 (10th Cir. 1985) (noting that the trial court exercises discretion in determining whether to postpone discovery). By requiring defendants to institute lawsuits against the very officials procuring evidence to convict them before the termination of ongoing criminal proceedings, an accrues-during-prosecution rule creates a serious risk of governmental discovery abuse.

C. Filing a § 1983 Suit During a Criminal Proceeding Prejudices an Innocent Person's Criminal Defense and His § 1983 Claim

Criminal defendants are severely prejudiced when they must file § 1983 suits during ongoing criminal proceedings.

As an initial matter, they put their own criminal defense at risk. The very filing of a § 1983 complaint requires a criminal defendant to publicly allege facts related to his pending criminal case. To survive a motion to dismiss, a complaint must "contain sufficient factual matter ... to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Filing a complaint that meets the *Iqbal-Twombly* particularity standard may require the waiver of attorney-client, physician, or Fifth Amendment privilege over some information and consequently undermines effective criminal defense representation. It could require an accused to assert specific facts, specific defenses, and specific supporting witnesses before the criminal trial even begins—effectively inverting the Constitution's guarantee that the government must prove its case beyond a reasonable doubt before an accused is expected to put forth his own evidence and witnesses or waive his right to silence. Parallel criminal and

civil cases thus critically endanger a defendant's constitutional trial rights, and criminal defendants who pursue parallel claims will often be put to an impossible choice: testify in the civil case to meet the burden of production and persuasion, or decline to testify to protect their right to say nothing at all and hold the government to its burden of proof in the pending criminal trial.

The criminal defendant who declines to testify in the civil case prejudices the civil claim. A "claim of privilege is not a substitute for relevant evidence," and civil litigants who invoke privilege are still required to meet their evidentiary burdens. *United States v. Rylander*, 460 U.S. 752, 761 (1983). Thus, the government in a civil case may move for summary judgment based on the lack of testimony from the plaintiff and adverse inferences that can be drawn from the invoking of privilege. But the criminal defendant who testifies in the civil case and thus waives his Fifth Amendment silence subjects himself and his witnesses to cross-examination. This prejudices his own criminal defense and may assist the government in unjustly procuring a conviction.

Thus, a civil plaintiff who is also the subject of a criminal prosecution is in a Catch-22: the criminal defendant must make a "choice between being prejudiced in the civil litigation, if the defendant asserts ... her Fifth Amendment privilege, or from being prejudiced in the criminal litigation if ... she waives that privilege." *Louis Vuitton Malletier S.A. v. LY U.S.A., Inc.*, 676 F.3d 83, 97 (2d Cir. 2012); *see United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 83 (2d Cir. 1995). No plaintiff should be required to choose between being effectively compelled to give testimony and being protected from law enforcement miscon-

duct. Such a choice of evils is no choice at all. *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1089 n.10 (5th Cir. 1979). But an accrues-during-prosecution rule demands just that result.

Even assuming the best case scenario—that the civil litigation is stayed pending the outcome of the criminal prosecution—criminal defendants still suffer. *Amici* themselves have seen prosecutors reference the defendant's stayed civil action during criminal cross-examination, insinuating that the defendant has a motivation to be untruthful while testifying in his criminal case in order to reap the benefit of a monetary award in civil litigation. This creates the harmful suggestion that a defendant's plea of not guilty and subsequent stance at trial is about his potential for financial gain rather than his actual innocence. This characterization of the defendant can then be reinforced in the prosecutor's summation. Not only does this undermine the defendant's substantive right to the presumption of innocence, it also deters him from exercising his constitutional right to testify in his criminal case. Or, in the alternative, it deters him from filing a meritorious § 1983 suit, lest he be labeled a non-credible witness in his criminal case. The prejudice that a defendant experiences by filing parallel civil and criminal cases is therefore not eliminated by a stay in the civil litigation pending the outcome of the criminal trial.

An accrues-during-prosecution rule puts innocent criminal defendants in an unnecessary bind. It is adverse to the principle that court-imposed procedures should not require litigants to surrender one constitutional right in order to assert another. *See Simmons v. United States*, 390 U.S. 377, 393-94 (1968).

III. An Accrues-During-Prosecution Rule Functionally Forecloses Many § 1983 Evidence-Fabrication Claims and Would Have Devastating Consequences

The problems with an accrues-during-prosecution rule are not merely doctrinal or logistical. Evidence fabrication is a serious, systemic problem. An accrues-during-prosecution rule will effectively bar many credible claims of evidence fabrication by innocent defendants aggrieved by intentional, outrageous government misconduct. Without the ability to vindicate these claims, defendants in many cases will be entirely without remedy for their constitutional injuries, and state officials who have used false evidence to put innocent people behind bars will face no real consequences. That sort of injustice will hurt everyone—not just criminal defendants. It will undermine public confidence in the courts and increase the likelihood that citizens will be wrongfully convicted.

A. Evidence Fabrication is a Systemic Problem

Evidence fabrication is far from rare. Perhaps the best known sort of fabrication is police officers lying or stretching the truth on the stand or in documents to obtain a warrant, foreclose pretrial release, prevent the suppression of seized evidence, or secure a conviction. *See* Goldstein, *supra* (investigation revealing more than 25 occasions since January 2015 in which judges or prosecutors found "a key aspect of a New York City police officer's testimony was probably untrue"). Prosecutors, under pressure to obtain convictions, often turn a blind eye to the practice, which provides an advantage that can be "too much ... to resist." Richard A. Rosen, *Disciplinary Sanc-*

tions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. Rev. 693, 732 (1987).

Fabrication can take even more brazen forms. In several widely publicized scandals, officers have been caught creating or manipulating physical evidence. *See* Paul Duggan, *"Sheetrock Scandal" Hits Dallas Police; Cases Dropped, Officers Probed After Cocaine "Evidence" Turns Out to be Fake*, Wash. Post, Jan. 18, 2002, at A12 (39 cases in Dallas dismissed when material that police laboratory had initially deemed cocaine was actually ground-up sheetrock); Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L. Rev. 545, 549 (2001) (Los Angeles police officers systematically planted evidence and coerced or fabricated witness statements). Officers have also been known to coerce or manufacture confessions, witness testimony, and identifications. *See* Goldstein, *supra* (describing case of officers falsely reporting witness identifications).

Amici have firsthand experience with the human cost of these evils. To take but one example, an attorney at one *amicus* organization represented David Ranta, charged with the 1990 killing of a prominent rabbi. Mr. Ranta maintained his innocence from day one. But, facing a purported eyewitness testifying against him and a typed confession with his signature on it, a jury convicted Mr. Ranta and a judge sentenced him to life imprisonment. Even after a woman came forward in 1995 and explained that her husband, and not Mr. Ranta, had killed the rabbi, Mr. Ranta's efforts to vacate or reverse his conviction were unsuccessful. Sixteen years later, however, another witness came forward and admitted that he committed perjury at the trial and that, before he

picked Mr. Ranta out of a lineup, a detective had told him "to pick the man with the big nose." Mr. Ranta was finally exonerated and released in 2013 after spending 23 years in prison. *See* Frances Robles, *Man Framed by Detective Will Get $6.4 Million From New York City After Serving 23 Years for Murder*, N.Y. Times (Feb. 20, 2014), http://perma.cc/GSC4-Y6Q4.[2]

Shocking individual cases of fabrication are just the tip of the iceberg. Data suggests that a high percentage of wrongful convictions are based at least in part on fabricated evidence. For instance, 102 of the first 362 DNA exonerations documented by The Innocence Project (28%) involved false confessions, a paradigmatic type of fabricated evidence. *DNA Exonerations in the United States*, Innocence Project, https://perma.cc/2BZ2-VUGJ (last visited Nov. 6, 2018). Of the 2,293 exonerations logged in the National Registry of Exonerations, 52% indicate official misconduct as a contributing factor; 57% feature perjury or a false accusation; and 24% involve false or misleading forensic evidence. *Exonerations by Contributing Factor*, Nat'l Registry of Exonerations, http://perma.cc/6WJE-2UBA (last visited Nov. 1, 2018). Misconduct was yet more frequent in murder convictions. *See id.*

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[2] The detective in Mr. Ranta's case, Louis Scarcella, played a role in securing at least fourteen other convictions that have since been vacated, many based on findings or serious accusations of official misconduct. *See Shawn Williams*, Nat'l Registry of Exonerations, http://perma.cc/TYF6-UDHN; Alan Feuer, *Another Brooklyn Murder Conviction Linked to Scarcella Is Reversed*, N.Y. Times (Jan. 11, 2018), http://perma.cc/85SN-HZYN.

And in *amici*'s experience, data gleaned from exonerations underestimates the frequency with which fabricated evidence is used against criminal defendants. It does not account for the many prosecutions that are dropped after fabrication comes to light. Nor does it account for fabricated evidence that is suppressed by a judge or disbelieved by a jury.[3]

B. An Accrues-During-Prosecution Rule Will Functionally Bar Many Meritorious Evidence-Fabrication Claims

Predictably, all of this fabrication gives rise to many viable claims under § 1983. But an accrues-during-prosecution rule will foreclose a large share of these claims. For the reasons described above, defendants who bring fabrication claims during their criminal proceedings could face dismissal under *Heck*. Criminal defendants whose proceedings take longer than the limitations period, but who fail to

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[3] *See, e.g.*, *Gray v. Commonwealth*, 480 S.W.3d 253, 258-59 (Ky. 2016) (vacating murder conviction where defendant's confession was based in part on "forged lab report of DNA evidence linking [the defendant] to the murders"); *State v. Gaston*, 187 So.3d 1008 (La. Ct. App. 2015) (mem.) (affirming suppression of evidence where trial court found that officer had fabricated an inculpatory statement); *People v. Redmond*, 449 N.E.2d 533, 536 (Ill. Ct. App. 1983) (affirming suppression of evidence where warrant affiant "lied or had exhibited a reckless disregard of the truth" about a purported "conversation with a reliable informant"); *People v. Baez*, 661 N.Y.S.2d 759, 764 (N.Y. Sup. Ct. 1997) (suppressing evidence based on finding that officer's story about inculpatory telephone call was "a fabrication made up later to justify earlier unlawful conduct").

sue, will be time-barred before their claims are even ripe.

But even defendants whose criminal proceedings are shorter—and who thus could theoretically bring their claims within the limitations period—will face severe restrictions. Given the typical timelines of criminal proceedings, many criminal defendants may have only months following their criminal trials to file their civil claims. In the Bronx, for example, misdemeanor cases that reached jury verdicts between 2013 and 2017 were, on average, almost thirty months old. *See* Crim. Ct. of the City of N.Y., *Annual Report 2017*, at 49-50 (2018), http://perma.cc/2B34-XXZA. If a defendant in an average Bronx misdemeanor case had a viable fabrication-of-evidence claim accrue around the time of his arrest, at best he would have only six months to find counsel, duly investigate the claim, and file a complaint before the three-year limitations period expired. And that is just for the average misdemeanor—many misdemeanors in the Bronx are more than thirty months old and would therefore be even closer to a time-bar. Proceedings tend to be even longer for more significant charges like serious felonies, where the consequences of fabrication are even greater.

Elsewhere in America, the time constraints could be even more severe. As of 2013, for example, 539 inmates in Cook County Jail had been held for more than two years awaiting trial, and forty had been held for more than five years. *See* David Thomas, *Burke Criticizes Pretrial Jailing, Extended Stays*, Chi. Daily L. Bull., Dec. 11, 2015, http://perma.cc/TKN5-5Q9U.

The rule's practical harshness compounds for claims held by the most vulnerable defendants. For

example, one *amicus* organization has several cases still in pretrial proceedings that have been open for more than three years, and the defendant in each of these cases has mental competency issues. Defendants with issues of mental incompetency are the least capable of filing civil rights claims on their own or finding lawyers to help them. And because of the myriad procedural steps required to evaluate competency, these defendants' cases tend to last the longest. Likewise, serious homicide charges often remain on the courts' dockets for more than three years because homicide cases frequently have no statutory speedy trial requirement. *See, e.g.*, N.Y. Crim. Proc. Law § 30.30(3)(a). Homicide cases are also among the most likely to give rise to fabricated evidence—the evidence is often technical and involves forensics—but a defendant acquitted after the typical homicide trial would likely be time-barred from bringing suit. An accrues-during-prosecution rule thus creates a perfect storm: its harshest effects fall on cases most likely to involve fabricated evidence and where defendants are least likely to be able to promptly file civil claims.

C. In Many Cases, an Evidence-Fabrication Claim Under § 1983 is the Only Effective Form of Redress

An accrues-during-prosecution rule would matter less if there remained other avenues of relief for someone in the petitioner's shoes. But in many cases where officials use false evidence against innocent defendants, fabrication claims are the only adequate form of redress. Other constitutional torts will often be foreclosed or practically useless. If the fabricating official had "probable cause to believe the proceeding [could] succeed"—a notoriously low bar—then the

innocent defendant cannot bring a claim for malicious prosecution. *Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 417 (2d Cir. 1999). False arrest claims, beyond their own doctrinal limitations, generally provide such inconsequential relief that they are often not worth filing, particularly for defendants tried and incarcerated based on fabricated evidence.

Doctrines of immunity stand as additional barriers. Prosecutors have absolute immunity for all conduct undertaken in their capacity as advocates and, as the decision below demonstrates, that immunity covers even the knowing prosecution of charges based on fabricated evidence. *See* Pet. App. 17a-19a. Police officers have qualified immunity if reasonable officers could disagree about whether there was probable cause. *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). These hurdles do not stand in the way of fabrication claims. *See Ricciuti v. N.Y.C. Trans. Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (holding that presence of probable cause for an arrest does not immunize officer from evidence-fabrication claim and declining to give officer qualified immunity).

The petitioner's own case shows vividly how these barriers work in practice. The Second Circuit held that the prosecutor had absolute immunity from suit under a malicious prosecution theory. A false arrest claim would have been untimely and, even if legally viable, would provide inconsequential relief given that petitioner was subjected to two trials based on fabricated evidence. The evidence-fabrication claim was thus the petitioner's sole path to real recovery. Many more claims will meet a similar fate under an accrues-during-prosecution rule.

Ultimately, an accrues-during-prosecution rule would deter innocent people with legitimate claims

from filing civil suit by forcing them to choose between aggressively and completely defending themselves from the bad act or demanding a remedy from the bad actor. Or it would cause them to flood the courts with unripe claims to avoid the risks posed by the statute of limitations, wasting the resources of courts and litigants alike. Such a rule would be difficult to administer, inconsistent with precedent, and deeply unjust.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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MARCH 4, 2019

No. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CRIMINAL JUSTICE INSTITUTE OF HARVARD LAW SCHOOL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Criminal Justice Institute of Harvard Law School is the pre-eminent teaching institution concerning the provision of defense services to indigent defendants. In addition to clinical programs, the Criminal Justice Institute pursues various criminal justice initiatives and engages in broader public education, in areas of constitutional law, research, practice and policy.

SUMMARY OF ARGUMENT

The Second Circuit made an erroneous decision below by misinterpreting Supreme Court precedent and misunderstanding the nature of fabrication of evidence claims. The ruling below creates an unworkable standard, harms criminal defendants with meritorious §1983 claims, and causes confusion for defendants and the courts. *Amicus* respectfully submits that the decision below should be reversed because it will unfairly harm criminal defendants across the country and deny them access to justice.

The *McDonough* decision diverges from every other circuit in the country by requiring criminal defendants who believe that fabricated evidence has been used against them to file their §1983 suits when they "should have known" about the fabricated evidence instead of when the criminal proceedings conclude in

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Further, amici curiae states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amici curiae, their members, or their counsel, have made a monetary contribution to this brief's preparation or submission. See S. Ct. Rule 37.6

their favor. This makes it difficult for criminal defendants to file timely §1983 suits and thus prevents them from accessing those remedies that should be available to them.

The Second Circuit's "should have known" standard harms criminal defendants because it effectively shortens the statute of limitations on §1983 claims for fabricated evidence. The "should have known" standard causes the statute of limitations for these claims to begin running before the criminal proceedings conclude, and forces defendants to either divert attention from their ongoing criminal trials in order to bring a civil action or, more likely, to wait until the trial's conclusion. Moreover, this standard hinders criminal defendants from bringing §1983 claims by making it more difficult for criminal defendants to find competent counsel and effectively forcing them to bring partial claims. These practical challenges increase the likelihood that criminal defendants who have meritorious §1983 claims either will not bring them in the first place or will become enmeshed in procedural and practical problems if they do, and thus ruins any chance that the criminal justice system may provide these defendants with an adequate remedy.

The Second Circuit's standard also makes it easier for unethical state actors to fabricate evidence against criminal defendants because the chance of being exposed decreases. Ethical state actors are likewise harmed because they will be forced to respond to civil proceedings while in the midst of a criminal prosecution as criminal defendants will file claims earlier in order to ensure they do not pass the statute of limitations cut off. Moreover, the standard forces courts to engage in a fact-intensive inquiry in order to determine when an individual bringing a §1983 claim had

reason to know fabricated evidence was used against him, wasting judicial resources, creating inconsistency, and preventing finality in the process.

The Second Circuit devised the "should have known" standard because it mischaracterized the harm caused to criminal defendants when fabricated evidence is used against them. This Court has recognized that in order to determine the proper date of accrual, we must look to the common law tort most analogous to the claim at hand. Five circuits have understood that fabrication of evidence claims are most analogous to malicious prosecution, stating that in both claims the right at issue is the right to be free from an unjust legal proceeding. However, the Second Circuit disagreed with this consensus and improperly analogized fabrication of evidence claims to false arrest claims. This mischaracterization ignored the immense harm that the *involvement* in criminal proceedings causes to criminal defendants and their families, while also misunderstanding this Court's opinion in *Heck* which makes it clear that the statute of limitations for fabrication of evidence claims does not begin to accrue until the conclusion of the criminal proceedings.

Because the Second Circuit's decision below will harm criminal defendants and violates this Court's precedent, the Court should reverse and rule that the statute of limitations in fabrication of evidence claims does not accrue until the criminal proceedings terminate in the plaintiff's favor.

ARGUMENT

I. THE CIRCUIT SPLIT CREATED BY THE SECOND CIRCUIT'S INCORRECT DECISION IN *MCDONOUGH* WILL HARM CRIMINAL DEFENDANTS.

Courts have followed the decision in *Heck v. Humphrey* for fifteen years when faced with a fabrication of evidence claim. *Heck* states that a plaintiff may not bring a §1983 claim until his criminal trial has terminated in his favor. *See* 512 U.S. 477, 486–87 (1994). Five circuits have followed this rule, stating that the statute of limitations in fabrication of evidence claims only begins to run *after* the termination of criminal proceedings in the defendant's favor. *See Bradford v. Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015); *Floyd v. Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018) (per curiam); *Castellano v. Fragozo*, 352 F.3d 939, 959-960 (5th Cir. 2003) (en banc); *Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (citing *King v. Harwood*, 852 F.3d 568, 579 (6th Cir. 2017)); *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008). Additionally, the Seventh Circuit has held that upon the violation of a criminal defendant's constitutional rights the statute of limitations does not begin to run until the constitutional violation ends. *See Manuel v. City of Joliet*, 903 F.3d 667, 669-670 (7th Cir. 2018) ("*Manuel II*").

The Second Circuit, however, in its recent *McDonough* decision, held that the statute of limitations in fabrication of evidence claims begins to accrue when the defendant "should have known" about the evidence being used against him. *See McDonough v. Smith*, 898 F.3d 259, 266 (2d Cir. 2018). However, the court ruled this way based on a misunderstanding of the wrong done to a criminal defendant when fabricated evidence

is used against him in the legal process. While the court asserted that the harm is more analogous to that which occurs when the tort of false arrest takes place, rather than when there is malicious prosecution, *see id.* at 267, this represents a misunderstanding of the violation at issue. Given the Second Circuit's admission that this decision goes against the majority of other circuits, *see id.*, the norm among circuit courts to apply the law uniformly, *see United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987) (stating that "absent a strong reason to do so, we will not create a direct conflict with other circuits."), and the harm this rule creates for criminal defendants, the Court should reverse *McDonough* in favor of the correct bright line "favorable termination" accrual rule followed by the majority of circuits and mandated by *Heck*.

A. The Second Circuit Vitiates The Reasoning Behind The Bright Line Rule Set in *Heck* And Creates An Unworkable Standard That Potentially Shortens The Statute of Limitations on §1983 Claims.

The Court in *Heck* established the "favorable termination" accrual rule, which states that in order to recover damages, a "§1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *See Heck*, 512 U.S. at 486-87. Under this rule, the statute of limitations for a §1983 claim begins to run only once the criminal proceedings have terminated in the defendant's favor. *See id.*

In *McDonough*, however, the Second Circuit held that *Heck* does not apply to §1983 claims based on

fabrication of evidence, incorrectly ruling that fabrication of evidence is analogous to the tort of false arrest, which this Court has held is excepted from the *Heck* rule, *see Wallace v. Kato*, 549 U.S. 384, 393-94 (2007), since "the injury for this constitutional violation [fabrication of evidence] occurs at the time the evidence is used against the defendant to deprive him of his liberty . . ." *See McDonough*, 898 F.3d at 267. Therefore, the Second Circuit held that the statute of limitations begins to accrue when the criminal defendant "should have known" about the fabrication of evidence, even when that is well before the criminal proceedings ends. *See id. Heck*, however, was clear: a plaintiff seeking damages in a §1983 claim requires "the district court [to] consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence [and] if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *See Heck*, 512 U.S. at 487. That is exactly the case here. While Part II will explain in depth why it is incorrect to analogize to false arrest, in sum, *Heck* applies to fabrication of evidence claims because both malicious prosecution and fabrication of evidence center around state actors committing tortious conduct in order to attain a criminal conviction against the defendant. Therefore, in both *Heck* and here, the harm is ongoing through the end of criminal proceedings and, as such, any §1983 suit will effectively and improperly imply the invalidity of the conviction.

In essence, the Second Circuit is either requiring criminal defendants to vitiate *Heck*'s reasoning and attack their criminal conviction while the proceedings are ongoing, or to follow *Heck* and forfeit much, if not all, of the statute of limitations. Given Supreme

Court precedent, and the fact that the violation of McDonough's rights continued throughout the very taxing criminal trial he was forced to endure, the statute of limitations for his claim should have accrued only three years after the favorable termination of his criminal trial. However, per the Second Circuit's ruling, the statute of limitations for his §1983 claim began accruing well before *Heck* permits.

B. Even If *Heck* Does Not Foreclose Criminal Defendants From Filing A §1983 Lawsuit While Their Criminal Case Is Pending, The Second Circuit's Decision Should Still Be Reversed.

Even accepting the Second Circuit's logic that the *Heck* bar does not apply to §1983 claims based on fabrication of evidence, this rule would greatly harm criminal defendants with meritorious §1983 claims and put strains on the courts. Specifically, it would: 1) hinder criminal defendants' ability to bring §1983 claims; 2) create a complex legal framework for courts to apply, making harsh outcomes for defendants a likely possibility; 3) make it difficult for criminal defendants to find competent counsel; 4) reduce the punishment for unethical state actors engaging in this fabrication of evidence while harming ethical state actors; 5) encourage defendants to bring partial claims; and 6) cause confusion in the lower courts.

1. The Second Circuit's Rule Harms Criminal Defendants by Hindering Their Ability to Bring Meritorious §1983 Claims.

Under the Second Circuit's rule, defendants in the middle of a criminal trial will be forced to file a §1983 claim before they know whether they will be convicted

of a crime, and, thus, before they know whether such a claim will be moot. Given the obvious difficulty of filing a civil claim while defending oneself from a criminal prosecution, and for the reasons stated below, this standard effectively shortens the statute of limitations for §1983 claims because defendants will be forced to wait until after the conclusion of their trial to even contemplate bringing a civil action. The Second Circuit's decision therefore infringes on the rights of criminal defendants by reducing their ability to bring civil claims and shortening the statute of limitations if they do.

Moreover, a defendant who suspects the use of fabricated evidence at his criminal trial may not immediately know that it was intentionally fabricated. The "should have known" standard imputes knowledge onto an individual under intense duress. The point at which the defendant *should* have known is thus likely to differ from when he *did* know. The incredible deference to the court's fact-finding abilities thus not only muddies the process around making §1983 claims and consumes greater judicial resources, but also infringes on the rights of defendants who learn of the fabricated evidence used against them at a later point than when the court determines they *should* have known.

2. The Second Circuit's ruling creates practical difficulties forcing courts to engage in complicated factual determinations likely to negatively affect criminal defendants.

The Second Circuit's standard also creates practical difficulties by requiring a court in a §1983 case to consider events from a criminal defendant's perspective. That is, the court must necessarily consider how clear it was to the individual that some of the evidence

being presented at trial was fabricated. While this might seem clear, there are many factors that can complicate this determination. For example, considering the trust normally accorded government officials, a typical criminal defendant who hears about fabricated witness testimony will not necessarily suspect that a prosecutor or police officer fabricated evidence. Instead, the criminal defendant will likely believe the seemingly more plausible theory that a witness has misremembered events or even that he himself has a faulty recollection. While a court may take this and other contextual factors into account when applying the Second Circuit's rule, their failure to do so could have serious implications for meritorious §1983 claims and the defendants who have the right to bring them. Therefore, the Court should remove the possibility all together by reversing the *McDonough* decision.

3. The Second Circuit's standard makes it difficult for defendants find counsel.

As explained above, *McDonough* complicates the process for bringing a §1983 claim for fabrication of evidence and, as a result, makes it more difficult for defendants bringing fabrication of evidence claims to navigate this area of the law. At the same time, the Second Circuit's standard makes it more difficult for these same individuals to obtain competent counsel to assist them.

Many criminal defendants are incarcerated in pretrial detention, before and during their trials, *see* Lauren Kelleher, *Out on Bail: What New York Can Learn from D.C. About Solving A Money Bail Problem*, 53 Am. Crim. L. Rev. 799, 799 (2016) ("Pick any day and at least sixty percent of the jail population in the United States is composed of pretrial detainees."), making it difficult for them to find counsel to assist in

bringing their §1983 claims. *See, e.g.*, *Wallace*, 549 U.S. at 389 (explaining that incarcerated victims face limitations in bringing §1983 suits). Furthermore, if a criminal defendant is forced to bring his claim before the criminal trial concludes, potential attorneys will not only have inadequate factual information regarding the claim but will also be unsure if it will be moot following trial. *See Heck*, 512 U.S. at 484–87. If the criminal defendant is convicted, his §1983 claim immediately becomes moot. *See id.* Thus, risk-averse attorneys will be wary to take a case which may not only be dismissed on procedural grounds, but also involves a client unable to pay attorney fees. Therefore, even criminal defendants who are not detained may have trouble finding counsel to assist in their §1983 suits.

As a result, a criminal defendant unable to retain counsel for their §1983 suit may choose to forego their claims altogether, especially if they think that filing a civil claim of this nature could negatively affect the outcome of their criminal trial. Without counsel to inform the criminal defendant of the way the criminal and civil claims interact, the defendant may make ill-informed decisions that prevent him from remedying the violation of his rights.

Moreover, even if the criminal defendant finds counsel for his §1983 suit, counsel may face difficulties in gathering the necessary information and building a case given his incarcerated client. *See, e.g.*, Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. Ill. L. Rev. 1, 17-22 (1998) (describing the difficulties for counsel in successfully preparing for trial with an incarcerated client); *see also* John D. Parron, *Pleading for Freedom: The Threat of Guilty Pleas Induced by the*

Revocation of Bail, 20 U. Pa. J. Const. L. 137, 151 (2017) ("A defendant who is detained will often have trouble communicating with his attorney and preparing for trial"). Under such conditions, criminal defendants will be discouraged from filing §1983 claims and, even if they do, less successful in the outcome.

Conversely, under the rule followed by five other circuits, criminal defendants can be sure that their claims will not be barred if they wait until after their criminal proceedings conclude to file suit. At this time, they will often not be incarcerated when obtaining counsel. Moreover, they will have finished their stressful, time-consuming, and resource-draining criminal trial allowing them to focus on finding adequate representation to remedy the violation of their constitutional rights.

4. The Second Circuit's Rule Encourages Unethical State Actors to Fabricate Evidence While Harming Ethical State Actors.

Since the Second Circuit's standard makes it more difficult to bring §1983 claims, bad actors who fabricate evidence are less likely to be subject to legal process. As the Second Circuit has stated and was repeated in *McDonough*, "[t]he forwarding by an investigating officer to a prosecutor of fabricated evidence, or . . . the alleged creation or use of such evidence by both investigating officers and the prosecutor, 'works an unacceptable corruption of the truth-seeking function of the trial process.'" 898 F.3d at 266 (quoting *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)). The Second Circuit's rule, however, makes it easier for officials to engage in corrupt acts by making it more difficult for defendants to file civil claims challenging this sort of action. The

McDonough decision therefore reduces the disincentives for rogue state actors to fabricate evidence in order to get a conviction and also infringes on the constitutional rights of the victims of such action by making it harder for them to seek recourse.

On the other hand, ethical state actors who have not fabricated evidence will be harmed by the Second Circuit's decision. Since, under *McDonough*, a criminal defendant who suspects that evidence against him has been fabricated must file suit while the criminal proceeding is outstanding, the prosecution will have to deal with discovery requests and possible media attention regarding the civil suit while still in the midst of the case. Essentially, prosecutors will be forced to defend themselves against discovery requests and potentially turn over evidence to the defense that they would not have had to otherwise, while they are still prosecuting the criminal defendant. Thus, the Second Circuit's decision in *McDonough* encourages unethical state actors to more blatantly violate the law while punishing ethical state actors who committed no wrongs in their official duties as prosecutors.

5. The Second Circuit's Rule Forces Defendants to Bring Partial Claims.

The *McDonough* decision will also lead to criminal defendants bringing partial claims because, under the Second Circuit's decision, defendants will file §1983 claims while their criminal trial is ongoing. This will occur far before they have had a chance to fully understand the scope of the evidence fabrication. The Second Circuit itself has stated that "piecemeal and wasteful litigation" should be avoided, *see Marcel Fashions Grp., Inc. v. Lucky Brand Dungarees, Inc.*, No. 17-cv-0361, 2018 WL 3650826, at *4 (2d Cir. Aug. 2, 2018) (quoting *N. Assurance Co. of Am. v. Square D Co.*, 201

F.3d 84, 89 (2d Cir. 2000)), and this is exactly the type of litigation this standard will engender. The Court should thus seek to deter the filing of a civil claim while a criminal proceeding is ongoing — as the Court enshrined in *Heck* — and thereby discourage the filing of partial claims in a manner that is detrimental to individuals who have had their rights infringed. The Court should thus reverse the Second Circuit's decision below to prevent piecemeal and wasteful litigation.

6. The Circuit Split Will Cause Confusion and Uncertainty in the Lower Courts.

As it currently stands, a defendant who brings a §1983 claim in Jersey City (Third Circuit) could have an extremely different process than a similarly situated defendant who is just across the Hudson River in Manhattan (Second Circuit). This division between the circuits is confusing and harms potential plaintiffs by making it harder for them to know the law given its inconsistency. *See Landgraf v. Usi Film Products*, 511 U.S. 244, 265 (1994) (noting that "elementary considerations of fairness dictat[e] that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."). This uncertainty prevents individuals from knowing the law, which is intrinsically unjust, and will create outcomes that are determined by the circuit in which they occur. The Court should thus reverse to ensure uniformity and fairness across the circuits.

II. THE SECOND CIRCUIT REACHED ITS DECISION BY IMPROPERLY TREATING FABRICATION OF EVIDENCE CLAIMS LIKE FALSE ARREST CLAIMS, RATHER THAN MALICIOUS PROSECUTION AS FIVE OTHER CIRCUITS DO.

Unlike five other circuits, the Second Circuit concluded that malicious prosecution is not the common law tort analogue for fabrication of evidence claims. This Court has ruled that, in order to determine the proper date of accrual, we must look to the common law tort most analogous to the claim at hand. *See Heck*, 512 U.S. at 483. In other words, "a court evaluates the proper accrual date for a claim by identifying the common law analogue for the §1983 claim and applying any distinctive accrual rules associated with that common law analogue." *Bradford*, 803 F.3d at 388 (citing *Wallace*, 549 U.S. at 389-92) (internal quotations omitted). Instead of following the five other circuits, the Second Circuit incorrectly ruled that false arrest was the appropriate common law analogue for fabrication of evidence claims.

A. Malicious Prosecution Is The Appropriate Tort Analogue.

Applying *Wallace*, the Ninth Circuit was the first circuit to explicitly establish that fabrication of evidence claims are most analogous to malicious prosecution actions. *See id.* The Ninth Circuit in *Bradford* explained that the right at issue in a fabricated evidence claim is "the right to be free from criminal charges based on a claim of deliberately fabricated evidence." *Id.* (citing *Devereaux v. Abbey*, 263 F. 3d 1070, 1075 (9th Cir. 2001) (internal quotations omitted). Similarly, the court stated that the tort of malicious prosecution "involves the right to be free from the use of legal

process that is motivated by malice and unsupported by probable cause." *Id.* (citing *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004)). Thus, the critical similarity between malicious prosecution and fabrication of evidence claims is that they are both centered around the right to be free from an unjust legal proceeding.

The *Bradford* court then examined specific accrual rules that apply to the tort of malicious prosecution. *See id.* at 388-389. Looking to a Fourth Circuit case, the court found that malicious prosecution claims do not accrue until the proceedings against the plaintiff have "terminated in such a manner that [they] cannot be revived." *Id.* (citing *Owens v. Baltimore City State's Atty's Office*, 767 F.3d 379, 390 (4th Cir. 2014); W. Page Keeton, et al., *Prosser & Keeton on Torts* § 119 (5th ed.1984)). Applying this standard to the claim at hand, the court held that fabricated evidence claims do not accrue until the charges against the defendant are "fully and finally resolved." *Id.* at 389.

Indeed, the Third, Fifth, Sixth, and Tenth Circuits all recognized the correctness of the Ninth Circuit's reasoning and followed the rule set forth in *Bradford*. *See Floyd*, 722 F. App'x at 114; *Castellano*, 352 F.3d at 959-960; *Mills*, 869 F.3d at 484 (citing *King*, 852 F.3d at 579); *Mondragon*, 519 F.3d at 1083. In *Floyd*, the Third Circuit embraced the favorable termination accrual rule, stating that a "claim alleging fabrication of evidence" should be treated "in the same way as [a] claim of malicious prosecution." 722 F. App'x at 114. This was again underscored in *Mills*, in which the Sixth Circuit emphasized that the "basis of a fabrication-of-evidence claim under 1983 is an allegation that a defendant knowingly fabri ated evidence against a plaintiff, and that there is a reasonable

likelihood that the false evidence could have affected the judgment of the jury." 869 F.3d at 484.

As the bulk of the case law has established, malicious prosecution is the appropriate common law analogue for fabrication of evidence claims. The most obvious and important similarity between the two is that they both center around the misconduct of state officials, mainly prosecutors or police, to attain a criminal conviction. They both offer a recourse for individuals who have been targeted as defendants in unjust trials. Unlike false arrest, both malicious prosecution and fabrication of evidence "permit[] damages for confinement imposed pursuant to legal process." *Heck*, 512 U.S. at 484. Lastly, as the *Bradford* court noted, both courses of action protect the right to be free from unfair criminal processes. *See* 803 F.3d at 388.

Moreover, the allegations in *Heck*, which this Court held were analogous to the tort of malicious prosecution, are strikingly similar to the allegations in the case below. The complaint in *Heck* alleged that the prosecutors:

> [E]ngaged in an unlawful, unreasonable, and arbitrary investigation leading to petitioner's arrest; knowingly destroyed evidence which was exculpatory in nature and could have proved [petitioner's] innocence; and caused an illegal and unlawful voice identification procedure to be used at petitioner's trial.

512 U.S. at 479 (citation omitted). The allegations in *McDonough* are that the prosecutor presented to the Grand Jury, and in the subsequent trials, an:

> [A]lleged scheme [that] included using forged affidavits, offering false testimony, and using faulty DNA methods for analyzing materials

> used in processing the ballot applications, all despite Smith knowing that McDonough was innocent.

898 F.2d at 263-64. The Court in *Heck* did not give a name to the petitioner's claim. Instead, the *Heck* Court simply explained that for "claims of the type considered here" the closest analogy came from the "common-law cause of action for malicious prosecution." 512 U.S. at 484. But when comparing the allegations in *Heck* and *McDonough* it becomes clear that there is little difference between them. Both involve altered evidence used by the prosecution to attempt to obtain a conviction. If the allegations in *Heck* were analogous to the tort of malicious prosecution, surely the allegations here are also analogous to malicious prosecution – and not to the inapposite tort of false arrest.

Thus, the distinctive "favorable termination" accrual rule associated with malicious prosecution should be applied to fabrication of evidence claims as well.

B. The Second Circuit Improperly Treated Fabrication Of Evidence Claims Like False Arrest Claims.

Fabrication of evidence claims are critically different from false arrest claims and should not be treated the same way for accrual purposes. One of the key aspects of both malicious prosecution and fabrication of evidence claims is that they center around the unjust legal proceedings. Indeed, fabrication of evidence is unconstitutional for the very reason that it is a "corruption of the truth-seeking function of the trial process." *Ricciuti*, 124 F.2d at 130 (quoting *U.S. v. Agurs*, 427 U.S. 97, 104 (1976)).

By contrast, false arrest claims bear no relation to the legal proceedings against the accused. This Court recognized this critical distinction in *Wallace*, explaining that false arrest claims "end[] once the victim becomes held *pursuant to [legal] process*--when, for example, he is bound over by a magistrate or arraigned on charges. Thereafter, unlawful detention forms part of the damages for the entirely distinct tort of malicious prosecution . . ." 549 U.S. at 389-90 (emphasis in original) (citation and quotation marks omitted). In other words, once lawful proceedings begin against the defendant, the false arrest claim accrues because the false arrest is over. Functionally, there is no overlap between false arrest and fabrication of evidence claims.

Furthermore, since false arrest claims accrue before or as the legal proceedings begin, they do not pose *Heck* problems as fabrication of evidence claims do. A criminal defendant is not attacking a criminal conviction through civil action, as *Heck* precludes, since at the time a false arrest claim accrues, there is never an extant criminal conviction. Moreover, it would not make sense to require termination of the proceedings in a manner favorable to the defendant in false arrest cases, because false arrests can still lead to valid convictions. *See Fifield v. Barrancotta*, 353 F. App'x 479, 481 (2d Cir. 2009). On the other hand, fabrication of evidence claims cannot lead to valid convictions because the legal proceedings have been corrupted. *See Ricciuti*, 124 F.3d at 130.

In the *McDonough* decision, the Second Circuit acknowledged that the Third, Ninth, and Tenth Circuits have all held that "the due process fabrication cause of action accrues only after criminal proceedings have terminated because those circuits have concluded that fabrication of evidence claims are

analogous to claims of malicious prosecution . . ." 898 F.2d at 267. Despite this strong consensus, the Second Circuit disagreed, arguing that:

> Because the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be the time he is arrested, faces trial, or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the cause of action accrues. Indeed, the harm—and the due process violation—is in the *use* of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding.

Id. at 267 (emphasis in original). However, this is a mischaracterization of when the harm to the defendant occurs. *Bradford* established that the right at issue in fabrication of evidence claims is the right to be free from unjust criminal proceedings. *See* 803 F.3d at 388. In other words, the harm to the defendant is the *involvement* in the unjust proceedings, not just the *outcome* of the proceedings. This Court acknowledged this distinction in *Heck*, where it stated that the critical wrong of the tort of malicious prosecution is the "wrongfulness of the prosecution," which persists through the "lawful conclusion" of the proceedings. *Heck*, 512 U.S. at 486 n.5.

The Second Circuit's mischaracterization demonstrates a fundamental misunderstanding about *why* fabrication of evidence is harmful. Indeed, it appears that the *Bradford* and *Heck* courts understood something that the Second Circuit does not: mere *involvement* in criminal proceedings can wreak havoc on a defendant's life, even in the event of a "not guilty"

verdict. The Second Circuit's decision dangerously disregards all of the ways involvement in an ongoing criminal trial can harm a defendant.

First, criminal trials can be prohibitively expensive and pose an enormous cost burden for defendants, especially for those who do not qualify for state aid. *See Lafler v. Cooper*, 566 U.S. 156, 175 (2012) (Scalia, J., dissenting) (describing the ordinary criminal process as "too long, too expensive, and unpredictable"). In addition to the costs associated with defending oneself, if the criminal defendant is in pre-trial detention, "it places significant financial costs on detainees and their families, who, in addition to suffering the stigma of having a loved one in jail, are also deprived of the detainee's financial support." Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344, 1356 (2014). Furthermore, many criminal defendants in pre-trial detention, even if it is just for a short time while gathering money to pay bail, lose their jobs and are unable to get them back after gaining freedom. *See id.* Although other countries have awarded court costs and legal fees to criminal defendants acquitted at trial, the United States criminal justice system does not. *See Costs and the Plea Bargaining Process: Reducing the Price of Justice to the Nonindigent Defendant*, 89 Yale L. J. 333, 334-35 (1979). This leaves a defendant who wins an acquittal few means for recovering the costs of trial. *See id.* at 335.

Second, being a defendant in an ongoing criminal trial is extremely time consuming. Importantly, time spent in court or standing trial is often time spent missing work or school. *See* Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 Fla. L. Rev. 761 n. 44 (1999)

("Defendants . . . often will find that the costs of pursuing a trial-time and *wages lost*, lawyer's fees, etc.-will outweigh the magnitude of the sentence likely to be imposed . . .") (emphasis added). This is particularly damaging for defendants who do not have employers that will let them miss work for court dates or jobs that do not afford them the luxury of flexible schedules.

The defendant's education can also be at risk. In fact, in some states, students can be suspended from school indefinitely while they are under criminal investigation or on trial. *See, e.g.*, Mass. Gen. Laws Ann. ch. 71, § 37H 1/2 (West 2014) ("Upon the issuance of a criminal complaint charging a student with a felony or upon the issuance of a felony delinquency complaint against a student, the principal or headmaster of a school in which the student is enrolled may suspend such student for a period of time determined appropriate by said principal or headmaster . . ."). Every minute spent in an unjust legal proceeding is a minute the student cannot attend school. Thus, criminal legal proceedings, regardless of their result, can seriously disrupt employment and education.

Third, the psychological stress of being involved in ongoing litigation cannot be overstated. Defendants, especially ones who know they are innocent, may feel attacked, frightened, and angry. They may experience damage to their reputation in their community and feel that their character is being assassinated. *See, e.g.*, *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 803 (1980) (Blackmun, J., concurring) ("[T]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, *and his reputation*.") (emphasis added) (quoting 1 W. Blackstone, Commentaries).

Collateral consequences of losing their jobs or families are all at stake. The risk of losing one's liberty is alone incredibly anxiety-producing. The risk of spending years behind bars is so stressful that it can even cause innocent people to plead guilty in hopes of gaining a more favorable sentence. *See, e.g.*, National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/trialpenaltyreport/ ("Guilty pleas have replaced trials for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose. Faced with this choice, individuals almost uniformly surrender the right to trial rather than insist on proof beyond a reasonable doubt").

Notably, courts have allowed plaintiffs to recover substantial damages for mental and emotional distress from malicious prosecutions, even in the absence of a conviction. *See, e.g., Genovese v. Cty. of Suffolk*, 128 F. Supp. 3d 661, 680 (E.D.N.Y. 2015) (allowing $700,000 damage award for emotional damages stemming from malicious prosecution); *Stampf v. Long Island R. Co.*, 761 F.3d 192, 205-208 (2d Cir. 2014) (awarding $20,000 for emotional damages sustained from a malicious prosecution because "returning to work every day with coworkers who were aware that Stampf was arrested for grabbing another coworker's breast would cause some emotional distress"); *Strader v. Ashley*, 877 N.Y.S.2d 747, 751 (3d Dep't 2009) (same); *Zimbelman v. Savage*, 745 F. Supp. 2d 664, 686 (D.S.C. 2010) (same). These cases act as a window into the psychological trauma of standing trial.

Involvement in litigation is costly, time-consuming, and stressful. For these reasons, it makes practical

sense that five circuits would classify the right at hand in fabrication of evidence claims as the right to be free from unjust legal proceedings. The Second Circuit's mischaracterization of the right at hand ignores the multiple ways criminal defendants face harm from the mere involvement in criminal legal proceedings.

Based on this mischaracterization, the Second Circuit improperly analogized fabrication of evidence claims to false arrest claims. This resulted in an inappropriate accrual rule that will cause confusion in the courts and harm defendants. Therefore, this Court should reverse the lower court's decision.

CONCLUSION

For the aforementioned reasons, *amicus*, the Criminal Justice Institute urges this Court to reverse the decision of the United State Court of Appeals for the Second Circuit and find that the statute of limitations in fabrication of evidence claims does not begin to accrue until the criminal trial has terminated in the plaintiff's favor.

Respectfully submitted,

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March 4, 2019

No. 18–485

In the Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor (as the majority of circuits has held) or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use (as the Second Circuit held below).

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of professors Leah Litman, James Pfander, Suzanna Sherry, Amanda Tyler, and Stephen Vladeck. Their principal fields of study are federal jurisdiction, federal procedure, and constitutional law, subjects they have researched and written about extensively. Their interest in this case is simply that of friends of the Court.

Leah Litman is an Assistant Professor of Law at the University of California, Irvine School of Law. Her scholarship focuses on how federalism and the separation of powers influence constitutional interpretation and procedural justice, particularly in the area of criminal law. Professor Litman's work is published in the California Law Review, the Michigan Law Review, the Virginia Law Review, the Duke Law Journal, and the Northwestern Law Review. In the past, she taught at Stanford Law School and Harvard Law School, and served as a law clerk to Justice Anthony Kennedy and Judge Jeffrey Sutton.

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party has authored this brief in whole or in part and that no one other than *amici* and their counsel has made any monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

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SUMMARY OF ARGUMENT

The Court should adopt a rule that § 1983 claims challenging state criminal proceedings do not accrue until those proceedings terminate in the criminal defendant's favor. That rule is the only one consistent with the existing framework coordinating claims between the state and federal courts.

This Court's decisions establish a federal-state-federal sequence for the management of constitutional challenges to state criminal proceedings. *Heck v. Humphrey*, 512 U.S. 477 (1994); *Rose v. Lundy*, 455 U.S. 509 (1982); *Younger v. Harris*, 401 U.S. 37 (1971). Before state criminal proceedings begin, a federal court can adjudicate questions bearing on those potential proceedings. Once the state criminal proceedings are instituted, state courts enjoy decisional primacy, and federal courts are displaced until the completion of state proceedings. And when the state criminal proceedings are complete, the appropriate federal remedy depends on the nature of the claim: if the successful claim would impugn an outstanding state criminal judgment or require speedier release from custody, then habeas corpus provides the exclusive remedy; where the claim seeks some other relief, it can be brought pursuant to § 1983.

This existing framework serves a number of salutary purposes. It provides an orderly procedure in which only one court at a time decides the issues. It avoids conflicting resolutions from different courts and stops litigants from racing to judgment in state or federal court, thereby limiting the need

to consider questions of preclusion between federal and state proceedings. It keeps federal dockets clear of unmeritorious cases and claims that would routinely require dismissal or an indefinite stay. And it advances longstanding parity and comity principles fundamental to our federal-state system. Federal courts are stopped from interfering with state court jurisdiction, "'allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights.'" *Rose*, 455 U.S. at 518 (quoting *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)). State courts are presumed to be as competent as the federal courts when it comes to protecting constitutional rights. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 n.12 (1987) (abstention rests on "proper respect for the ability of state courts to resolve federal questions"); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). And federal courts must respect the finality of state criminal judgments and custody, except in narrow circumstances. 28 U.S.C. § 2254; *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973); *Heck*, 512 U.S. at 484-85.

Petitioner's proposed rule, under which § 1983 claims challenging state criminal proceedings do not accrue until those proceedings have terminated in the criminal defendant's favor, fits this sensible regime and promotes the same goals. The Second Circuit's early accrual rule does the opposite. It would undermine the existing framework and create doctrinal and claim-coordination problems.

ARGUMENT

I. A SETTLED FRAMEWORK COORDINATES LITIGATION OF CONSTITUTIONAL CLAIMS BETWEEN STATE CRIMINAL COURTS AND FEDERAL COURTS

This case asks the Court to devise an accrual rule for § 1983 claims that challenge the validity of ongoing state criminal proceedings. That rule should be fashioned in accordance with three existing bodies of law that already work together to coordinate the adjudication of federal constitutional claims between the state criminal courts and the federal courts: *Younger* abstention, federal habeas corpus, and the *Preiser-Heck* line of cases. This part discusses those doctrines and the framework they collectively establish.

A. *Younger* Abstention

The *Younger* doctrine developed to cabin the use of § 1983 to enjoin ongoing state criminal cases. The Anti-Injunction Act, 28 U.S.C. § 2283, generally bars federal courts from enjoining ongoing state court proceedings. In *Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972), the Court held that § 1983 is an "expressly authorized" exception to the Anti-Injunction Act. But injunctions against state criminal proceedings are limited by the doctrine of equitable restraint from *Younger v. Harris*, 401 U.S. 37 (1971).

1. *Younger* considered a request to enjoin a state prosecution that allegedly violated federal constitutional rights. 401 U.S. at 38-39. The Court

concluded that federal courts cannot, except in extraordinary circumstances, enjoin state criminal prosecutions. *Id.* at 53-54; see also *Samuels v. Mackell*, 401 U.S. 66, 73 (1971) (applying the same holding to claims for declaratory relief).

"Since the beginning of this country's history," *Younger* explained, "Congress has, subject to a few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." 401 U.S. at 43. This longstanding policy against federal interference in state proceedings is justified in part by the view that a court's equity jurisdiction should be restrained "in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings[.]" *Id.* at 44. But there is "an even more vital consideration," the Court observed, that justifies abstention:

> the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism[.]'

Id.

Younger recognized that allowing state criminal defendants to challenge their ongoing prosecutions in federal court could flood the federal courts with anti-suit litigation, considering that the injury

alleged in such cases is "solely 'that incidental to every criminal proceeding brought lawfully and in good faith[.]'" *Id.* at 49 (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 164 (1943)). The Court explained that state criminal defendants in nearly all cases can effectively vindicate their constitutional rights by adjudicating their federal defenses in the state criminal proceeding, since state and federal courts are presumed equally competent. *Id.* at 45.

Younger therefore established a presumption that federal courts should abstain from considering challenges to pending state criminal proceedings. A suit subject to *Younger* must be dismissed. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) ("*Younger v. Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts.").[2]

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[2] *Younger*'s prohibition on federal suits challenging state criminal proceedings has exceptions, including: when the prosecution is brought in bad faith or to harass; when the state criminal law is patently unconstitutional; when the state forum is inadequate; and other extraordinary circumstances. A body of literature explores these exceptions. *E.g.*, Fred O. Smith, Jr., Abstention in the Time of Ferguson, 131 Harv. L. Rev. 2283 (2018); Owen M. Fiss, *Dombrowski*, 86 Yale L.J. 1103 (1977). There can be no dispute, however, that normal claims of constitutional violations affecting the fairness of state criminal proceedings—claims like Petitioner's—cannot fit these exceptions, lest the exceptions swallow the rule. *Cf. Hicks v. Miranda*, 422 U.S. 332, 352 (1975).

2. The *Younger* presumption applies from the start of state criminal proceedings until their end. The Court's later decisions in *Steffel v. Thompson*, 415 U.S. 452, 475 (1974), and *Doran v. Salem Inn*, 422 U.S. 922, 930 (1975), establish that *Younger* does not affect federal injunctive and declaratory suits adjudicated before state proceedings begin.

But *Younger* applies to all federal cases filed after state criminal proceedings, and to some in which the federal suit gets underway first but a state criminal case is later filed. *Hicks v. Miranda* held that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force." 422 U.S. at 349. As a result, although a federal court might enjoin a potential state criminal proceeding by reaching the merits of a constitutional challenge before the state criminal case is filed, the filing of a state criminal case otherwise brings *Younger* abstention into play.

Once invoked, *Younger* requires the federal court to exercise restraint until the state criminal case ends, whether it ends with a dismissal, an acquittal, or the conclusion of state criminal appeals. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609-11 (1975). The *Younger* doctrine thus prevents duplicative litigation, permits the state courts to pass first on constitutional defenses raised in criminal proceedings, and promotes Our Federalism.

B. Federal Habeas Corpus

The same principles have animated the development of federal habeas corpus. The writ of habeas corpus is much older than the United States. It was presumptively available at common law to test the legality of detention, an idea enshrined in the Suspension Clause. *INS v. St. Cyr*, 533 U.S. 289, 300-02 & n.14 (2001); see generally Amanda L. Tyler, Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay 13-33, 123-40 (2017).

Lower federal courts did not originally have the authority to issue writs examining state detention. Judiciary Act of 1789 § 14, 1 Stat. 73, 81-82. In 1867, Congress first authorized the lower courts to grant writs of habeas corpus to state prisoners held in violation of the Constitution, laws, and treaties of the United States. Habeas Corpus Act of 1867, 14 Stat. 385, 385-86. Two aspects of federal habeas review of state criminal cases are important here: exhaustion and exclusivity.

1. The federal habeas statute has been amended and interpreted many times. One constant, however, is the rule that federal habeas review of state criminal convictions or custody must await completion of state proceedings. *Ex parte Royall* announced this rule, concluding that it is justified by considerations of federal-state comity. 117 U.S. 241, 251-53 (1886). Congress then codified the

exhaustion requirement in 1948. Act of June 25, 1948, § 2254, 62 Stat. 869, 967.[3]

Congress and the Court have reaffirmed habeas exhaustion requirements many times. For instance, when *Brown v. Allen* endorsed re-litigation of federal constitutional defenses that had been considered and rejected in state criminal courts, the Court held that such review could take place only after the exhaustion of state remedies. 344 U.S. 443, 487 (1953). The Court in *Wainwright v. Sykes* established a presumption against habeas review of claims that were not first presented to state courts. 433 U.S. 72, 89-91 (1977). Shortly after, *Rose v. Lundy* held that petitions presenting both exhausted and unexhausted claims should be dismissed. 455 U.S. at 522. Recognizing the parity and comity concerns that gave rise to the exhaustion requirement, the Court "provid[ed] a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Id.* at 520. Finally, in passing the 1996 Anti-Terrorism and Effective Death Penalty Act,

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[3] Even before the lower federal courts were empowered to grant writs of habeas corpus to state prisoners, the notion that federal review should wait until the conclusion of state criminal proceedings was embodied in Section 25 of the Judiciary Act of 1789, 1 Stat. 73, 85-87, which provided as-of-right review in this Court of federal defenses rejected in state criminal courts, but only after completion of the state proceedings and entry of a final judgment.

Congress imposed a strict version of the exhaustion requirement. 28 U.S.C. § 2254(b)&(c).

2. Despite restrictions on its availability, federal habeas corpus remains the exclusive mechanism by which lower federal courts can review extant state criminal proceedings, convictions, and custody. *Fay v. Noia*, 372 U.S. 391, 399-406 (1963); see also *Allen v. McCurry*, 449 U.S. 90, 104 & n.24 (1980) ("It is difficult to believe that the drafters of [§ 1983] considered it a substitute for a federal writ of habeas corpus[.]"). And habeas corpus occupies this role in the circumstances that Petitioner faced. While exhaustion requirements mean that habeas relief is not immediately available to a state criminal defendant who is facing trial in state court and wishes to raise federal constitutional defenses to the proceedings, habeas nevertheless is that defendant's exclusive federal avenue of review. *Ex parte Royall*, 117 U.S. at 251-53; see also *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 488-93 (1973) ("We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court."); *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-02 (1984) (holding that a defendant released before trial is in custody for purposes of the federal habeas statute but must wait until exhaustion of state criminal proceedings

to seek relief).[4] Never has this Court suggested that there is any federal mechanism for securing relief from state custody or a state conviction other than habeas corpus.

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The history of habeas corpus in the United States and its current statutory and doctrinal form thus complement the principle of *Younger*: Once state criminal proceedings are initiated, habeas exhaustion requirements, like *Younger*, ensure that state courts are given the first chance to pass on constitutional questions, and that federal courts do not interfere in state criminal cases. After state proceedings are complete, federal habeas provides the exclusive mechanism for federal courts to re-litigate the validity of the state criminal proceedings, a state conviction, or state custody, limiting federal interference to exceptional circumstances.

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[4] Petitioner's conditions of pre-trial release satisfy the definition of custody established in *Lydon*, 466 U.S. at 301 and *Hensley v. Municipal Court*, 411 U.S. 345, 351-53 (1973). See Brief for Petitioner at 12-13. In those cases the Court considered whether defining custody to include litigants in Petitioner's situation would cause a flood of habeas petitions from state prisoners facing trial. The Court rejected that argument, emphasizing that habeas exhaustion requirements still require resort first to state court proceedings. *Hensley*, 411 U.S. at 351-53.

C. The *Preiser-Heck* Cases

Concerns about preserving state court primacy through habeas exclusivity animate the *Preiser-Heck* cases, which provide that § 1983 claims are not cognizable if they imply the invalidity of an existing state criminal judgment or state confinement. Instead, such § 1983 claims accrue, if at all, only upon favorable termination of the state criminal case. By establishing this deferred accrual rule, the *Preiser-Heck* cases protect habeas corpus as an exclusive federal remedy, ensuring that carefully designed limitations on habeas corpus (such as exhaustion) cannot be circumvented using § 1983. This principle has been well established for decades.

1. *Preiser v. Rodriguez* considered a § 1983 claim for injunctive relief brought by state prisoners who sought to restore good-time credits and secure release from custody. The Court barred the claims, concluding:

> Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal relief under [federal habeas] laws. It would wholly frustrate explicit congressional intent to hold that the respondents . . . could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that

> specific determination must override the general terms of § 1983.

411 U.S. at 489-90.

The Court's emphasis on habeas exclusivity was based not only on the habeas statute but also on the history of the writ. "[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody," the Court wrote, and "the traditional function of the writ is to secure release from illegal custody." *Id.* at 484; see also *id.* at 485 (discussing the writ's role in securing release from custody at common law and at the Founding) (quoting *Ex parte Bollman*, 8 U.S. 75 (1807), and *Bushell's Case*, 124 Eng. Rep. 1006, 1007 (1670)). The Court reiterated that the writ plays this role where the challenge is to state custody prior to a conviction. *Preiser*, 411 U.S. at 486 (noting that when a litigant claims "he has been imprisoned prior to trial on account of a defective indictment against him, as in *Ex parte Royall*, . . . his grievance is that he is being unlawfully subjected to physical restraint, and . . . habeas corpus has been accepted as the specific instrument to obtain release from such confinement.").

Preiser therefore instructs courts to ask whether a § 1983 claim would intrude upon the exclusive domain of habeas corpus. If the § 1983 claim seeks the type of relief traditionally obtained in a federal habeas proceeding, then it cannot be entertained. The Court explained that this conclusion is also justified by the parity and comity principles underlying federal habeas and *Younger* abstention. *Id.* at 490-92.

2. *Heck v. Humphrey* applied *Preiser*'s logic to § 1983 damages actions. 512 U.S. 477. Heck sought damages (and separately filed for habeas relief), contending that due process violations had infected his state criminal proceedings and had caused his wrongful conviction. *Id.* at 478-79. Drawing an analogy to common-law malicious prosecution, *Heck* held that a § 1983 damages action implying that a state conviction or confinement is invalid must await the final invalidation of that conviction or confinement. *Id.* at 483-87. Before such favorable termination, the § 1983 claim is not cognizable, and it must be dismissed without prejudice. *Id.* at 479, 483, 490. In turn, the § 1983 claim accrues, if ever, when a favorable termination is obtained. *Id.* at 489-90.

Like *Preiser*, *Heck* was grounded in comity concerns. 512 U.S. at 484-85 ("This Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack[.]"). And the Court again emphasized the exclusive role of habeas corpus, barring § 1983 damages suits that imply an entitlement to the type of relief traditionally secured by the writ. *Id.* at 489 ("Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus."); see also *id.* at 490 n.10. Favorable termination was imposed as a prerequisite to such claims.

The Court's decision to defer the accrual of § 1983 damages claims until favorable termination

was also prompted by preclusion principles. The Court noted that deferring such claims prevents parallel litigation and conflicting determinations on the same issues, and it promotes "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 486. Before *Heck* was decided, the Court had concluded in *Allen v. McCurry*, 449 U.S. at 105, that state criminal judgments have preclusive effect in later § 1983 litigation. By deferring a § 1983 suit until the state court judgment is invalidated, *Heck* avoided preclusion that otherwise would have been mandated by *Allen*.[5]

3. This Court has repeatedly reaffirmed *Heck* and its favorable-termination rule. *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) ("Throughout the legal journey from *Preiser* to *Balisok*, the Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either *directly* through an injunction compelling speedier release or *indirectly* through a

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[5] While § 1983 claims are subject to both issue- and claim-preclusion rules, *Allen*, 449 U.S. at 105; *Migra v. Warren City School District*, 465 U.S. 75, 85 (1984), federal habeas proceedings are not, *Noia*, 372 U.S. at 422-23. This distinction reinforces the exclusive and exceptional nature of the habeas remedy.

judicial determination that necessarily implies the unlawfulness of the State's custody.").[6]

The lower courts have developed this body of law further. *Heck*'s deferred accrual rule has now been applied thousands of times, either to delay the accrual of § 1983 damages suits (typically in cases where *Heck* bars a state prisoner's suit) or to authorize the immediate filing of suits despite their relationship to state criminal proceedings (typically in cases that merely challenge the conditions of prison confinement).

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[6] *Wolff v. McDonnell*, 418 U.S. 539 (1974), allowed a § 1983 challenge to procedures used to revoke good-time credits because success would not compel speedier release from state custody; *Edwards v. Balisok*, 520 U.S. 641 (1997), barred a damages claim challenging the deprivation of good-time credits because success would necessitate earlier release; *Muhammad v. Close*, 540 U.S. 749 (2004), permitted a challenge to prison disciplinary procedures because success would not affect the length of confinement; *Nelson v. Campbell*, 541 U.S. 637 (2004), allowed an action to enjoin an execution procedure, holding that it did not compel relief from the underlying criminal sentence; *Wilkinson v. Dotson*, 544 U.S. 74 (2005), permitted a challenge to parole procedures because success would not necessarily mean speedier release from prison; *Wallace v. Kato*, 549 U.S. 384 (2007), authorized the immediate filing of a claim challenging an false arrest that occurred prior to state criminal proceedings; and *Skinner v. Switzer*, 562 U.S. 521 (2011), permitted a suit for DNA testing because the results of the testing would not necessarily compel relief from a state conviction or confinement.

* * *

By deferring accrual of § 1983 suits challenging the validity of state criminal proceedings, state custody, or a state criminal judgment, the *Preiser-Heck* cases protect the exclusive domain of habeas and acknowledge the preclusive effect of judgments that may issue during the state criminal proceeding. As *Preiser* recognized, these justifications for deferred accrual apply in full force to claims challenging the validity of state custody prior to a criminal conviction. The favorable-termination requirement reinforces the same parity and comity considerations that underlie the federal habeas regime and the *Younger* doctrine.

D. The Existing Framework Summarized

Understood together, the *Younger* doctrine, federal habeas corpus, and the *Preiser-Heck* case line form a unified framework. *Younger* establishes a barrier to the federal courts at the start of state criminal proceedings. Federal courts have the power to enjoin potential state criminal proceedings, but they must adjudicate such constitutional challenges before state criminal proceedings begin. Once legal process issues from a state criminal court, the balance tips. The *Younger* doctrine then displaces the federal court, requiring abstention absent some special circumstance.

Federal courts remain divested throughout state criminal and post-conviction proceedings. *Younger* applies until the end of direct appeals in the state courts. Habeas exhaustion requirements then ensure that all state procedures—not just direct appeals, but also state post-conviction remedies—

are completed before the state criminal defendant can seek relief in federal court. And the *Preiser-Heck* case line holds that claims seeking the type of relief allocated to federal habeas corpus (or implying that such relief is warranted) cannot be filed pursuant to § 1983.

Only at the conclusion of state criminal proceedings may the federal courts step back in, and at that point these doctrines also define what relief they may provide. In a rare circumstance, the state criminal case might end in an acquittal, at which point the federal court may adjudicate a claim without the need for judicial restraint. But usually the defendant is convicted and resort to state direct appeals and state post-conviction procedures is required first. If relief is obtained there, the defendant will either have secured a judgment of acquittal, again obviating the need for federal judicial restraint, or a retrial in the state criminal courts, during which the federal courts would remain displaced.

But if state appellate or post-conviction procedures do not yield relief, then federal habeas corpus stands as the exclusive federal mechanism for setting aside the extant state criminal judgment or challenging the duration of state confinement. That type of relief cannot be obtained, or a right to it implied, in a suit brought under § 1983. Instead, to obtain damages for an allegedly unconstitutional state criminal proceeding, state custody, or a state criminal judgment, a suit under § 1983 must wait until the criminal case terminates finally in the criminal defendant's favor.

In nearly all cases, federal consideration of constitutional challenges to state criminal proceedings occurs, if at all, either before the state proceedings begin or after they have concluded. This federal-state-federal sequence is based on and reinforces fundamental interests. It allows for the orderly processing of claims by one court system at a time, which in turn prevents a race to judgment or conflicting resolutions in different forums. It acknowledges parity between the state and federal courts, presuming that state courts are as competent to resolve federal constitutional questions and providing them with the first opportunity to do so. And it promotes comity by avoiding undue interference with state proceedings and by respecting state criminal judgments, while at the same time maintaining the power of federal courts to vindicate important constitutional rights.

II. SIMILAR RULES COORDINATE CONSTITUTIONAL CLAIMS IN STATE-FEDERAL CIVIL PROCEEDINGS

If there were any doubt that this framework reflects an intentional design, the same principles are implemented in this Court's decisions coordinating civil cases between state and federal courts. These cases also promote state court primacy and delay federal review of state proceedings.

In *Pennzoil v. Texaco*, the Court applied *Younger* abstention to state civil proceedings, holding that the losing litigant in a state trial court cannot bring a § 1983 suit challenging state court

procedures as unconstitutional. 481 U.S. 1, 10 (1987). The appropriate avenue is to present such constitutional claims first to the state courts and to appeal any judgment in the state system. *Id.* at 17.

A federal court adjudicating § 1983 claims that were the subject of earlier state court litigation is required by the Full Faith and Credit Act, 28 U.S.C. § 1738, to give preclusive effect to a state court judgment to the same extent the rendering state court would. *Allen*, 449 U.S. at 105. Similarly, under *Parsons Steel v. First Alabama Bank*, a lower federal court can determine the preclusive effect of a prior federal-court decision—and thus enjoin a state proceeding under the re-litigation exception to the Anti-Injunction Act—but only if the state court has not already ruled on the preclusion question. 474 U.S. 518, 524 (1986).

Lastly, the *Rooker-Feldman* doctrine provides that the lower federal courts lack jurisdiction to consider a challenge brought by a party who has already lost in state court at the time the federal suit is filed and seeks relief from the state court judgment. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 291-94 (2005). Appellate authority to review judgments of the state courts rests exclusively in this Court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923).

Like the existing framework coordinating constitutional claims between state criminal and federal courts, these doctrines permit a federal court to decide an issue before the state court acts. But once the state courts have ruled on a question, that ruling has preclusive effect and can be

overturned only after completion of all state appeals, and then only by this Court. The state case must complete its journey through the state courts before the federal court can act. These rules in civil cases serve the same basic principles of parity and comity that animate the framework governing claims in criminal cases.

III. PETITIONER'S PROPOSED ACCRUAL RULE FITS THE EXISTING FRAMEWORK AND SERVES ITS ANIMATING COMITY AND FEDERALISM VALUES

Petitioner proposes a deferred accrual rule for his § 1983 claim challenging the legality of his state criminal prosecution. He advocates for this rule by analogy to common-law torts, based on the standard federal limitations rule, and under the continuing violation doctrine. Brief for Petitioner at 14-18. *Amici* agree with Petitioner that a deferred accrual rule is essential. In their view, that rule is mandated by the existing federal-jurisdiction framework.

Only a deferred accrual rule fits the framework laid out above. If a defendant challenging ongoing state criminal proceedings files a habeas petition, the petition will be dismissed for failure to exhaust. If that defendant instead asks for declaratory or injunctive relief to stop the proceedings, *Younger* will require dismissal of the action. Completing this picture, the logic of the *Preiser-Heck* case line dictates that a § 1983 suit for damages should be dismissed if it necessarily implies the invalidity of those same proceedings, as in McDonough's case.

Because claims like McDonough's imply the invalidity of state proceedings, they seek relief traditionally secured by a writ of habeas corpus. Deferring accrual of those claims prevents an end run around the federal habeas regime and preserves habeas as the sole federal mechanism for reviewing state criminal proceedings. In so doing, it promotes principles of parity and comity, and it ensures orderly processing of constitutional claims affecting state criminal proceedings.

In sum, the existing framework coordinating constitutional claims between state criminal courts and the federal courts dictates that *Heck*'s deferred accrual rule should be applied starting at the beginning of state criminal proceedings. Section 1983 claims implying that ongoing state criminal proceedings are invalid, seeking speedier release from state custody, or attacking a state criminal judgment are not cognizable. As in *Heck*, this recognition compels the corollary conclusion that § 1983 claims challenging state criminal proceedings do not accrue until the state criminal case terminates finally in the criminal defendant's favor.

IV. *WALLACE* FITS THE EXISTING FRAMEWORK AS WELL

Wallace v. Kato is not to the contrary. 549 U.S. 384 (2007). There the Court considered the accrual of a § 1983 claim that alleged a false arrest prior to any state criminal proceeding. *Id.* at 387 n.1 & 390 n.2 (noting that the grant of *certiorari* was limited to that question and that other claims had been abandoned). So limited, the claim in *Wallace*

questioned the legality of a seizure *in the absence of judicial proceedings*, not the legality of a state criminal proceeding. *Id.* at 389-90. Accordingly, the Court concluded that the claim accrued with the seizure, *id.* at 388 (or at latest when the arrestee was bound over on charges, *id.* at 391-92). Wallace had not timely filed his claim. *Id.*

Wallace's early accrual rule for Fourth Amendment claims challenging conduct *prior to* state criminal proceedings fits the existing framework. Unlike constitutional claims attacking ongoing state criminal proceedings or the legality of state custody secured by legal process, a claim that alleges an unconstitutional seizure by state actors without legal process is not typically the type of claim redressed by a writ of habeas corpus. *Stone v. Powell* held that Fourth Amendment claims alleging illegal searches or seizures prior to state criminal proceedings generally cannot be re-litigated in federal habeas proceedings. 428 U.S. at 494-95.[7]

In addition, *Wallace*'s conclusion that such Fourth Amendment claims accrue and can be considered by federal courts prior to state criminal proceedings is consistent with the rule that federal

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[7] In light of *Stone*'s holding, both the majority and concurring opinions in *Wallace* acknowledged that Fourth Amendment false arrest claims generally would not interfere with federal habeas. 549 U.S. at 395 n.5; *id.* at 398-400 (Stevens, J., concurring in the judgment).

courts generally may adjudicate constitutional claims that might bear on a future state criminal proceeding before the state proceedings get underway. *Supra* Part I.A. A similar claim under the Fourth Amendment was presented in *Gerstein v. Pugh*, which permitted a § 1983 claim for injunctive relief that challenged an illegal seizure before state criminal proceedings had started. 420 U.S. 103, 106-08 & nn.5, 6 & 9 (1975).

As *Wallace* recognized, many Fourth Amendment claims—those alleging excessive force, an illegal seizure of evidence, or an arrest without probable cause—have little to do with the fairness of state criminal proceedings that follow, if such proceedings follow at all. 549 U.S. at 393. Federal adjudication of such Fourth Amendment claims will rarely cause tension with state criminal proceedings or their resulting judgments, and they therefore do not implicate the concerns about claims processing, interference with federal habeas, or state court parity and comity outlined already.

For the same reasons *Heck* decided that a § 1983 claim challenging a state criminal judgment was not cognizable and did not accrue until favorable termination, *Wallace* concluded that there was no need to defer accrual of a claim contesting the legality of conduct that takes place in the absence of state criminal proceedings and before they begin. *Wallace*'s holding is consistent

with *Younger*, with the federal habeas regime, and with the rest of the *Preiser-Heck* case line.[8]

V. THE SECOND CIRCUIT'S PROPOSED ACCRUAL RULE WOULD UNSETTLE THE EXISTING FRAMEWORK

The Second Circuit's decision that McDonough's § 1983 claims accrued in the midst of his state criminal prosecution is contrary to the large body of law discussed in this brief. That early accrual rule would create the usual problems of duplicative litigation, including those addressed by current doctrines of preclusion and abstention; it would allow litigants to evade habeas exclusivity and limitations on federal habeas; and it undercuts the values of parity and comity.

A. Parallel Litigation Problems

1. A rule requiring criminal defendants to immediately file § 1983 suits asserting the constitutional defenses they have raised in their state criminal proceedings would lead to concurrent

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[8] When the Court decided in *Wallace* that the accrual of false arrest claims is not deferred, it said that *Heck*'s deferred accrual rule would not apply to "an action which would impugn *an anticipated future conviction*." 549 U.S. at 393. Understood in context, that statement rightly expressed a concern that, viewed ex ante, a court or party faced with a false arrest claim has no idea whether that arrest will result in a criminal proceeding. The Court had no occasion to address the issue presented in this case.

litigation of the same issues in two separate court systems. This double litigation would happen frequently, given that state criminal defendants would be required to file such § 1983 suits in order to preserve their claims in federal court. Litigation in two court systems would impose a burden not only on the federal plaintiff/state criminal defendant, but also on all of the state actors who would be involved in different roles in both proceedings. Entirely different procedural and discovery rules would apply to the separate cases, and the parties might use or block discovery in one case in order to gain an advantage in the other, particularly given that federal civil discovery is more fulsome than that typically allowed in state criminal cases.

2. Concurrent litigation would also present the potential for friction between the federal and state courts. The two court systems might issue inconsistent rulings on the same factual or legal issues. Pretrial or trial proceedings might lead to contradictory judgments. Once entered, a judgment in one court system could be used for its issue- or claim-preclusive effect in the other. In turn, the different court systems might reach contrary conclusions about the preclusive effect of their own or the other court's judgments. Depending on the state in which the criminal case was filed, the preclusive effect of the state court's judgment might change as the litigation proceeded in the two court systems. 18A Charles Alan Wright, et al., Federal Practice & Procedure § 4433 n.18 (3d ed. Nov. 2018 update). The preclusive effect of a federal decision

in state proceedings might be similarly variable. *Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938).

There would be races to judgment between the state and federal cases. If a state court judgment were entered, and it was found under *Allen* to have preclusive effect in the federal litigation, then dismissal of the § 1983 claims challenging the state proceedings would be required. That dismissal would occur regardless of the merit of the federal claims, and there would likely be no opportunity to re-file if the state judgment was later set aside on grounds, for example, that the criminal proceedings violated the Constitution.

Conversely, if the federal case beat the state criminal case to judgment, the federal judgment might dictate the resolution of contested issues in the state case or even its result. *Stoll*, 305 U.S. at 170 ("[W]here the judgment or decree of the Federal court determines a right under a Federal statute, that decision is final until reversed in an appellate court, or modified or set aside in the court of its rendition.") (internal quotation omitted). This Court has not defined the preclusive effect of a federal judgment in this context. *Heck*, 512 U.S. at 488 & n.9. Regardless, interference between federal and state court systems could become the norm.

3. Unlike Fourth Amendment claims, which often do not impugn the validity of a state criminal case, *Wallace*, 549 U.S. at 393, claims like McDonough's always do so. Accordingly, the Second Circuit's early accrual rule would open the federal courts to, and require the immediate filing of, a whole new class of § 1983 suits attacking ongoing

state criminal proceedings. The reasoning of *Younger* suggests that judicial restraint would be required in every such case, creating a unique category of federal cases requiring automatic abstention.[9]

If the Second Circuit's accrual rule brought *Younger* abstention automatically into play, that would raise an additional question about whether that automatic abstention would come in the form of a dismissal or a stay. As discussed, claims

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[9] This Court has left open whether *Younger* applies to damages suits. *Deakins v. Monaghan*, 484 U.S. 193, 202 (1988). Most courts have found that it does so apply. *Gilbertson v. Albright*, 381 F.3d 965, 979-80 (9th Cir. 2004) (en banc); *Nimer v. Litchfield Township*, 707 F.3d 699, 700 (6th Cir. 2013); *Rossi v. Gemma*, 489 F.3d 26, 37-38 (1st Cir. 2007); *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1228 (10th Cir. 2004); *Yamaha Motor Corp. v. Stroud*, 179 F.3d 598, 603-04 (8th Cir. 1999); *Majors v. Engelbrecht*, 149 F.3d 709, 714 (7th Cir. 1998); *Traverso v. Penn*, 874 F.2d 209, 213 (4th Cir. 1989); *Williams v. Hepting*, 844 F.2d 138, 144 (3d Cir. 1988). Three have suggested that it does not. *Kirschner v. Klemons*, 225 F.3d 227, 238-39 (2d Cir. 2000); *Bridges v. Kelly*, 84 F.3d 470, 477-78 (D.C. Cir. 1996); *Alexander v. Ieyoub*, 62 F.3d 709, 713 (5th Cir. 1995).

The question is neither presented by this case nor necessary to its resolution. Notably, however, by implementing a deferred accrual rule in this case, the Court can resolve two circuit splits at once. Adopting Petitioner's proposed rule and rejecting the Second Circuit's obviates the need to decide whether *Younger* applies to damages suits filed during state criminal proceedings because such suits will not be cognizable and will not accrue until after the criminal proceedings have terminated favorably.

subject to *Younger* require dismissal. *Supra* Part I.A. If all claims like Petitioner's accrued but were automatically dismissed, there would have been no point in requiring them to be filed in the first place. Worse yet, even if they were dismissed without prejudice, the claims would have accrued already and may be untimely once the *Younger* obstacle was removed.

The court below suggested that claims like Petitioner's might be stayed instead of dismissed. *McDonough v. Smith*, 898 F.3d 259, 268 n.13 (2d Cir. 2018). That, too, would be problematic. Federal courts are supposed to stay litigation only in exceptional circumstances, not as a routine matter in an entire category of cases. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983) (noting that only "exceptional circumstances" justify a stay pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976)); *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973) (observing that a stay under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), is appropriate only in "special circumstances"); *cf. Rhines v. Weber*, 544 U.S. 269, 276-77 (2005) (authorizing a stay-and-abey procedure for mixed habeas petitions, but limiting it to exceptional circumstances).

Requiring the filing and stay of all claims in this category would clog federal dockets with dormant constitutional suits. Many of those suits would lack merit, given that federal constitutional defenses are raised routinely in thousands of state criminal proceedings each year. Moreover, there would be no way to move the stayed claims off of federal

dockets. A small portion of state criminal proceedings might end relatively quickly in an acquittal, allowing the federal claims to proceed. But the vast majority of stayed claims would languish for years.

How long a stay would remain in place is also open to debate. A federal court's stay typically persists until the conclusion of state proceedings. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996). But district courts would have to decide whether that means the stay lasts until the end of state direct appeals, the conclusion of state post-conviction proceedings, the exhaustion of federal habeas remedies, or indefinitely until relief from the state criminal judgment is secured.

Regardless of the stay's duration, once the state criminal proceedings concluded, the state judgment would likely have preclusive effect in the federal case, another issue that would have to be litigated once the stay was finally lifted. (If the litigant instead waited until after state criminal proceedings were completed and still managed to timely file the federal suit, *Rooker-Feldman* would deprive the district court of jurisdiction to consider it.) In total, the Second Circuit's rule would require the filing of a large number of automatically stayed claims, the vast majority of which would lie dormant for years until they became precluded by a state court judgment.

This Court should not adopt an accrual rule that yields such results. As the Court noted in *Wallace*, claims accrue as a matter of federal law "'when the plaintiff has a complete and present cause of

action,' . . . that is, when 'the plaintiff can file suit *and obtain relief*.'" 549 U.S. at 388 (quoting *Bay Area Laundry v. Ferbar Corp.*, 522 U.S. 192, 201 (1997)) (emphasis added). Applying the Second Circuit's accrual rule would mean that in most cases filed the plaintiff would never have any opportunity to pursue the claim or obtain relief in federal court.

B. Federal Claim Coordination Problems

1. The Second Circuit's immediate accrual rule would also be difficult to administer alongside *Heck*'s deferred accrual rule. One way courts might try to reconcile the two rules would be to require litigants to split their claims, with the Second Circuit's immediate accrual rule governing claims attacking criminal proceedings before a conviction and *Heck* governing claims attacking any resulting criminal judgment. But splitting claims arising from the same transaction is rightly discouraged. *Stone v. Dep't of Aviation*, 453 F.3d 1271, 1278 (10th Cir. 2006) ("A plaintiff's obligation to bring all related claims together in the same action arises under the common law rule of claim preclusion prohibiting the splitting of actions.") (citing Restatement (Second) of Judgments § 24 (1982)). Consider if Petitioner had been convicted rather than acquitted. The Second Circuit's rule would have required him to immediately file his claim that the use of fabricated evidence rendered his criminal proceedings invalid, but *Heck* would defer accrual of his claim that the same fabricated evidence resulted in a conviction. And splitting the two claims would not change the fact that a § 1983 suit challenging the validity of pre-conviction state

criminal proceedings would necessarily impugn the resulting conviction, even if that suit did not mention the conviction explicitly.

A second possibility is that courts might apply the Second Circuit's immediate accrual rule to cases resulting in acquittals and *Heck*'s deferred accrual rule to cases resulting in convictions. But if that were the case, neither the federal court nor the putative plaintiff could know while state criminal proceedings were ongoing—*i.e.*, at the time the Second Circuit said the case should be filed—whether the state case would result in acquittal or conviction, and so it would be impossible to determine whether the claim should be allowed to proceed. The lower courts have worked hard to refine the complex doctrine established by the *Preiser-Heck* cases.[10] A new rule requiring the federal courts to analyze claim accrual based on a contingent future event—whether or not a § 1983 plaintiff who is also a criminal defendant is

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[10] To determine whether *Heck* applies, lower courts must already consider whether the § 1983 plaintiff's claim of error is so fundamental that it entirely invalidates the state's authority to keep him imprisoned or whether it merely requires a new hearing to determine whether the state has the authority to keep him imprisoned. Compare *Wolff*, 418 U.S. at 554-55 (prisoner may use § 1983 to challenge procedures used to revoke good-time credits), with *Edwards*, 520 U.S. at 648 (prisoner may not use § 1983 to challenge procedures used to revoke good-time credits because the procedural defect alleged (deceit and bias of decision maker) would imply invalidity of deprivation of credits).

ultimately convicted—cannot be administered. *Cf. Wallace*, 549 U.S. at 393 ("And what if the plaintiff (or the court) guesses wrong, and the anticipated future conviction never occurs[?]").

By contrast, a rule that defers every § 1983 claim challenging state criminal proceedings or a resulting judgment until favorable termination of the criminal case is simple to administer. If the criminal case has not resolved in the plaintiff's favor (whether because proceedings are ongoing or an unfavorable judgment is intact), then the civil suit must wait. If the criminal case is terminated favorably, then the claim has accrued and the civil suit can move forward.

2. The Second Circuit's accrual rule also conflicts with the federal habeas regime, a conflict that the *Preiser-Heck* cases exist to guard against. To date, habeas proceedings have been the exclusive federal forum for re-litigating the legality of state criminal proceedings. That exclusive mechanism has always required exhaustion of state court remedies before the federal court can act, as well as deference to the state court's decisions if the federal court does act.

The Second Circuit's accrual rule contemplates an immediate federal challenge to ongoing state criminal proceedings, which would evade limitations on federal habeas. Habeas would cease to be an exclusive federal remedy, and longstanding exhaustion requirements would be nullified. A claim could simply be re-pleaded under § 1983 to secure plenary review at the outset. See *Preiser*, 411 U.S. at 489-90 ("It would wholly frustrate

explicit congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings."); *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 77 (2009) (Alito, J., concurring) ("The rules set forth in our cases and codified in AEDPA would mean very little if state prisoners could simply evade them through artful pleading.").

That plenary review would necessarily entail far less deference to the state criminal proceedings than is required under AEDPA. Compare *Crawford-El v. Britton*, 523 U.S. 574, 594 (1998) (discussing the standard of proof applied in § 1983 cases), with *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (discussing the standards imposed by 28 U.S.C. § 2254(d)). The entire federal habeas regime, carefully constructed by Congress and this Court, would be undermined, and the role of federal courts in the supervision of state criminal proceedings would be redefined.

C. Federalism Problems

Last but not least, the Second Circuit's accrual rule undermines the principles of parity and comity that have animated this Court's claim coordination doctrines. Instead of delaying federal litigation until after the state criminal courts have had the initial opportunity to pass upon federal constitutional defenses, the Second Circuit has required litigants to immediately file those defenses as § 1983 claims in federal court. Implicit in that requirement is distrust for the state courts,

and a presumption that they are not competent to perceive and effectively remedy constitutional problems in their own criminal proceedings. Moreover, calling for § 1983 claims challenging state criminal proceedings to be filed in the midst of those proceedings disrespects the separate state governments, allows for federal interference in the states' performance of their separate functions, and calls into question decisions and judgments that issue from state proceedings. In short, the Second Circuit's accrual rule creates substantial federalism problems without any corresponding benefit.

CONCLUSION

There is no good reason to adopt the Second Circuit's accrual rule, and there are many good reasons not to. Petitioner's deferred accrual rule, on the other hand, fits neatly within the existing framework coordinating cases between state and federal courts. That rule would require a federal court to ask a simple question: Has the state criminal case terminated in the plaintiff's favor? If the answer is no, then a § 1983 claim challenging the state criminal case is not cognizable, and the federal court must dismiss it without prejudice. If the answer is yes, then the § 1983 claim has accrued and can proceed. While a state criminal proceeding is ongoing or a state judgment is in place, this rule ensures that habeas corpus remains the exclusive federal mechanism for securing relief from state custody and state criminal judgments. In the process, claim coordination problems are eliminated and the state courts are respected.

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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No. 18-485

IN THE
Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,
v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF INDIANA, ARKANSAS, LOUISIANA, NEBRASKA, OHIO, SOUTH CAROLINA, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the statute of limitations for a claim for damages based on the alleged use of fabricated evidence to institute criminal proceedings, brought under 42 U.S.C. § 1983, begins to run when the defendant discovers that fabricated evidence has been introduced in the criminal proceedings or when those proceedings are terminated in the defendant's favor.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Arkansas, Louisiana, Nebraska, Ohio, South Carolina, and Texas respectfully submit this brief as *amici curiae* in support of respondent.

Officials of *Amici* States are frequent defendants in cases brought under 42 U.S.C. § 1983, and for that reason they have a strong interest in promoting clarity in the law governing 1983 claims. As this case shows, lower courts' decisions and litigants' filings frequently display profound confusion over the nature of the 1983 claims at issue, including such fundamental matters as which constitutional rights and which common-law analogies—if any—the claims implicate.

In addition, the *Amici* States have an interest in ensuring that courts do not expand the set of claims cognizable under section 1983 to include theories unsupported by the Constitution. Petitioner asks the Court to set an accrual rule for a "fabrication of evidence" claim, a claim unmoored from any particular constitutional provision. If the Court were to accept this claim, it could subject state officials to 1983 claims that the Constitution does not authorize. Rather than address the accrual question presented by the petition, the Court should either dismiss the writ as improvidently granted or affirm the decision below on the ground that Petitioner has failed to state a

claim at all. Many cases cleanly present questions regarding the proper accrual rule for particular 1983 claims. This case is not one of them.

SUMMARY OF ARGUMENT

Section 1 of the Civil Rights Act of 1871 provides that any person who, under color of state law, deprives any person of "any rights . . . secured by the Constitution of the United States, shall . . . be liable to the party injured," 17 Stat. 13 (1871), Rev. Stat. § 1979 (1875). Although this provision, now codified as amended as 42 U.S.C. § 1983, has been the subject of hundreds of thousands of decisions in the nearly 150 years since its adoption, it continues to be a source of "conflict, confusion, and uncertainty." *Wilson v. Garcia*, 471 U.S. 261, 266 (1985).

This case is a prime example of the conceptual fog that has descended upon much of the litigation involving section 1983. Petitioner Edward McDonough was indicted for allegedly participating in a scheme of absentee-ballot fraud, and he claims respondent Youel Smith, the special prosecutor who directed his prosecution, framed him by "using forged affidavits, offering false testimony, and using faulty DNA methods." Pet. App. 5a. McDonough was never convicted—his first trial ended with a mistrial and his second concluded with his acquittal—and it is unclear whether he spent any significant time in custody, as he apparently was arrested and released on his own recognizance following his indictment. Pet. Br. 40. If he had been subject to a meaningful period of detention, the

complaint McDonough filed in response to the alleged frame-up presumably would have showcased his pre-trial custody. Instead, the 174-page, 1220-paragraph complaint seeks damages for his alleged financial, emotional, and reputational costs of undergoing the two criminal trials. J.A. 249–51, ¶¶ 1198–1208.

McDonough's complaint seeks these damages via two 1983 claims, one a "Constitutional Right Not to be Deprived of Liberty as a Result of Fabrication of Evidence," and the other a "Constitutional Right Not to be Prosecuted Maliciously without Probable Cause." *Id.* at 252–53. Notably, the complaint does not identify the precise constitutional source of these rights, *see id.* (listing only the Fourth, Fifth, Sixth and Fourteenth Amendments generally), and McDonough has not clarified his theories since. As the suit progressed, the constitutional foundations of McDonough's claims never materialized; the parties and courts merely characterized the claims as a "fabrication of evidence claim" and a "malicious prosecution" claim. Pet. App. 47a; *see also id.* at 6a (decision below stating that McDonough claims the defendants "(1) had violated his right to due process by fabricating evidence and later using it against him before the grand jury and in his two trials and (2) were liable for malicious prosecution"). Even now, McDonough's merits brief maintains that the Court need not "delve into what the elements of McDonough's constitutional claim are." Pet. Br. 19.

In short, McDonough has continually ignored "the threshold inquiry in a § 1983 suit, which requires courts to '*identify the specific constitutional right' at issue.*" *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017) (emphasis added) (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality opinion)). Only "[a]fter pinpointing that right," should courts "determine the elements of, and rules associated with, an action seeking damages for its violation." *Id.* McDonough has never clearly articulated the constitutional source of either of his claims, and the question he asks the Court to answer—when the statute of limitations began running against his "fabrication of evidence" claim—therefore "jump[s] the gun." *Id.* at 922 n.10.

Because it is impossible to answer the accrual question purportedly before the Court, the Court should either dismiss the writ as improvidently granted or affirm the dismissal of McDonough's claim on the ground that McDonough has failed to state a claim at all.

I. The history of section 1983 litigation shows that failing to identify the federal law "deprivation" underlying a 1983 claim inevitably sows confusion. *Id.* at 920. *Manuel* reminded courts that their first task is always to "identify the specific constitutional right at issue." *Id.* That task focuses the inquiry on the central constitutional issue and paves the way to answer later questions that depend on the claim's underlying

theory. The Court has taken precisely this constitution-first approach in prior cases addressing accrual rules. Because McDonough has failed to explain the constitutional basis of his claim, it is useless to attempt to answer his accrual question. The Court therefore should dismiss the writ as improvidently granted.

II. Even if the Court were to overlook McDonough's failure to identify specifically the constitutional right at issue, it is clear that the Due Process Clause does not recognize any such right. McDonough posits that the Due Process Clause may prohibit "subjecting a defendant to criminal charges on the basis of fabricated evidence," Pet. Br. 41, but this suggestion is foreclosed by the longstanding rule that the accused is not "entitled to judicial oversight or review of the decision to *prosecute*"—as opposed to the decision to *seize and detain*. *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (emphasis added). This means that the only right that could *possibly* support McDonough's "fabrication of evidence" claim is the Fourth Amendment right not to be seized without probable cause. Critically, however, any Fourth Amendment theory in this case was entirely encompassed by McDonough's "malicious prosecution" claim—which lower courts dismissed as to Smith on absolute immunity grounds, and which remains pending against the other defendants. And because the defendants have never had occasion to address the necessary elements of such a Fourth Amendment claim,

it would be unfair to permit McDonough to refashion his "fabrication of evidence" claim at this late date.

Accordingly, the Court should either dismiss the writ as improvidently granted or affirm the lower courts' dismissal of McDonough's "fabrication of evidence" claim.

ARGUMENT

I. Because McDonough Has Not Identified the Specific Right Underlying His Claim, the Court Cannot Decide When It Accrued

A. Lower court confusion underscores the importance of first identifying the basis of each particular 1983 claim

While the Civil Rights Act of 1871 created a "remedy for the violation of constitutional rights," *Wilson v. Garcia*, 471 U.S. 261, 277 (1985), it did not "contain a specific statute of limitations governing § 1983 actions," *id.* at 266. This statutory lacuna, "commonplace" in federal law, *id.*, has required courts to look to state law and general common-law principles to determine both the length and the beginning of the limitations period. And these common-law analogies, while often useful, also frequently distract courts and litigants from the central question in every 1983 case—whether the defendant, acting under color of state law, violated a right the Constitution confers on the plaintiff.

Courts originally determined the length of the limitations period in 1983 cases by "seeking state-law analogies for particular § 1983 claims" and choosing the limitations period for the state-law claim most analogous to the particular 1983 claim at issue. *Owens v. Okure*, 488 U.S. 235, 240 (1989). Because the "constitutional claims that have been alleged under § 1983 . . . encompass numerous and diverse topics and subtopics," and because "almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action," this practice "inevitably [bred] uncertainty and time-consuming litigation." *Wilson*, 471 U.S. at 272–73; *see also Owens*, 488 U.S. at 240. The Court ultimately resolved that confusion by identifying a single limitations period for each State—the period applicable to the State's personal-injury torts—and applying that period to *all* 1983 claims. *Id.* at 236.

Lower courts have continued to struggle, however, to identify rules for determining when limitations periods *begin* for 1983 claims. The limitations clock generally starts ticking when the plaintiff "has a complete and present cause of action." *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (internal quotation marks and citation omitted). But that rule requires courts to determine which elements constitute a "complete" cause of action for the various types of 1983 claims. And to answer that question courts have again looked for state-law and common-law analogies.

In *Heck v. Humphrey*, 512 U.S. 477, 478–79 (1994), for example, the Court applied the favorable-termination element of common-law malicious prosecution to a 1983 wrongful conviction and confinement claim predicated on the destruction of exculpatory evidence. The Court held that such a 1983 claim does not accrue until the plaintiff's "conviction or sentence has . . . been invalidated." *Id.* at 487. And in *Wallace*, the Court relied on the common-law rules for false arrest and false imprisonment to conclude that a 1983 claim for an unconstitutional arrest accrues "as soon as the allegedly wrongful arrest occur[s]," 549 U.S. at 388—although the limitations period does not begin until the "false imprisonment [comes] to an end" with the initiation of legal process, *id.* at 389.

There is strong support for using common-law analogies to resolve difficult questions unanswered by the statutory text: The Civil Rights Act of 1866 endorses "extend[ing]" state common law to 1983 cases when necessary. *See* 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1988); *Wilson*, 471 U.S. at 266–69. And the Court has long recognized that section 1983 "should be read against the background of tort liability." *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part on other grounds by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978); *see also Carey v. Piphus*, 435 U.S. 247, 257–258 (1978).

But while common-law analogies can be useful for implementing section 1983, it is crucial to remember

that "§ 1983 provides a uniquely federal remedy . . . [that] can have no precise counterpart in state law." *Wilson*, 471 U.S. at 271–72 (internal quotation marks and citations omitted); *see id.* at 272 ("[I]t is 'the purest coincidence' when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." (quoting *Monroe*, 365 U.S. 167 at n.5 (Harlan, J., concurring))). Common-law analogies, unfortunately, sometimes obscure section 1983's focus on the "deprivation" of a constitutional right, leading litigants and lower courts to confuse the common-law analogues with the actual 1983 claims.

For example, many 1983 plaintiffs—including McDonough—raise what they call "malicious prosecution" claims without ever identifying the precise constitutional deprivations that would make the claims actionable under section 1983. *See, e.g., Cordova v. City of Albuquerque*, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J., concurring) (observing that the plaintiff sought damages on the ground that "local law enforcement officials violated his Fourth or maybe his Fourteenth Amendment rights (we're never told which) by committing the common law tort of malicious prosecution," and that even the defendants "accept[ed] the premise that the Constitution somewhere (they too never say where) contains something resembling a malicious prosecution tort").

Similarly, courts adjudicating "malicious prosecution" 1983 claims often share "a common shortcoming—either not demanding that this genre of claims identify specific constitutional deprivations or struggling in their efforts to do so." *Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) (en banc). As the Fifth Circuit has recognized, using the "malicious prosecution" label, particularly without identifying the specific constitutional provision at issue, "only invites confusion." *Id.* at 954.

Like the earlier problems with matching 1983 claims to particular state-law torts for the purpose of identifying the applicable limitations period, parties' and courts' focus on common-law analogues rather than the constitutional violations themselves has led to "a mix of misstatements and omissions which leads to . . . inconsistencies and difficulties." *Id.* at 949; *see also Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009) ("If a plaintiff can establish a violation of the fourth (or any other) amendment there is nothing but confusion gained by calling the legal theory 'malicious prosecution.'" (internal brackets, quotation marks, and citation omitted)). In sum, failing to specify the constitutional right at issue in 1983 cases leads to mistaken conclusions and an increasingly unwieldy 1983 doctrine. *Cf. Graham v. Connor*, 490 U.S. 386, 394 (1989) (explaining that the validity of an "excessive force" claim under section 1983 "must . . . be judged by reference to the specific constitutional

standard which governs that [particular constitutional] right, rather than to some generalized 'excessive force' standard" (citations omitted)).

For these reasons, before determining the accrual rule for a particular type of 1983 claim, the Court should "insist on clarity in the identity of the constitutional violations asserted." *Castellano*, 352 F.3d at 945.

B. This case shows the need to identify the right underlying a 1983 claim

McDonough has failed to specify the constitutional basis of his claims, and his case aptly illustrates the hazards of proceeding with a 1983 case without a clear idea of the alleged constitutional violation at issue. As noted above, McDonough's complaint suggested that his "fabrication of evidence" and "malicious prosecution" claims could be premised on violations of the Fourth, Fifth, Sixth, and Fourteenth Amendments generally, without specifying which constitutional provisions were connected to which claims or how *any* of these provisions support either of the claims. *See* J.A. 249–51, ¶¶ 1198–1208.

More egregiously, in responding to the defendants' motions to dismiss in the district court, in his briefs on appeal, and now before this Court, McDonough has continued to refuse to specify whether the constitutional violation should be "characterized as a seizure without probable cause, a violation of due process, or

the absence of a fair trial." Cert. Pet. 25–26. His merits brief offers a few fleeting suggestions for how to ground his "fabrication of evidence" claim in a specific constitutional violation, Pet. Br. 41–43, but he remains unwilling to commit to any single theory. Indeed, he repeatedly asserts that there is "no need for the Court to determine the elements of the Section 1983 claim or otherwise analyze the cause of action." *Id.* at 3; *see also id.* at 19 ("The Court thus does not need to delve into what the elements of McDonough's constitutional claim are."); *id.* at 42 ("This Court need not decide in this case whether a Section 1983 claim based on fabrication of evidence should be textually housed within the Fourth Amendment or the Due Process Clause (or even within the Sixth Amendment).").

McDonough is certainly not the first 1983 plaintiff to refuse to spell out the constitutional violation that underlies his "fabrication of evidence" claim. For example, the Second Circuit itself, which has said a "fabrication of evidence" claim exists under section 1983, has repeatedly and explicitly refused to say where in the Constitution such a claim can be found. *See, e.g.*, *Ganek v. Leibowitz*, 874 F.3d 73, 90 n.10 (2d Cir. 2017); *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 276 n.6 (2d Cir. 2016); *Morse v. Fusto*, 804 F.3d 538, 547 n.7 (2d Cir. 2015).

Unsurprisingly, such refusal has led to "confusion" in the Second Circuit's cases. *McIntosh v. City of New York*, 722 Fed. App'x 42, 45 n.2 (2d Cir. 2018). But the

Second Circuit's unwillingness to define the constitutional right at issue is no excuse for McDonough's failure to do so; it is McDonough's responsibility to plead his claims adequately. And if the Court were to jump ahead to McDonough's accrual question without identifying the constitutional right underlying his claim, it would expand the confusion over "fabrication of evidence" claims far beyond the Second Circuit.

In skipping ahead to the accrual question, McDonough defies the Court's repeated instruction that "in any § 1983 action the initial inquiry must focus on . . . the two essential elements to a § 1983 action," whether the defendant "act[ed] under color of state law" and whether his conduct deprived the plaintiff "of rights . . . secured by the Constitution." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

Again, the Court squarely addressed this issue just two terms ago, when it held that "the threshold inquiry in a § 1983 suit . . . requires courts to 'identify the specific constitutional right' at issue." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017) (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality opinion)). The Court obligated lower courts to "determine the elements of, and rules associated with," a 1983 claim only "*[a]fter* pinpointing [the] right" underlying the claim. *Id.* (emphasis added).

As noted above, starting 1983 cases by identifying the constitutional right at issue minimizes confusion

and keeps the purpose of section 1983—remedying constitutional (and other federal law) violations—at the forefront. In addition, it is necessary to specify the constitutional right before proceeding to other questions because in the process of "applying, selecting among, or adjusting common-law approaches" to these questions "courts must closely attend to the values and purposes of the constitutional right at issue," *id.* at 921—which courts cannot do if they do not know *which* right is at stake.

Indeed, the Court's cases addressing when 1983 claims accrue often turn on the type of claim at issue. In *Heck*, for example, the Court confronted a 1983 claim brought by a prisoner who had been convicted of voluntary manslaughter following what he alleged was an "unlawful, unreasonable, and arbitrary investigation" that involved the knowing destruction of exculpatory evidence and the use of "an illegal and unlawful voice identification procedure" at his trial. 512 U.S. at 478–79. The Court held that the prisoner's "damages claims challenged the legality of the conviction" under the Due Process Clause, *id.* at 490, and that therefore his claim would not accrue until his "conviction or sentence has . . . been invalidated," *id.* at 486–87.

Meanwhile, in *Wallace* the Court held that a different accrual rule applied because the plaintiff had asserted a different sort of 1983 claim: He alleged that "officers had arrested [him] without probable cause, in violation of the Fourth Amendment." 549 U.S. at

386. The Court held that such Fourth Amendment unlawful-arrest claims accrue "as soon as the allegedly wrongful arrest occur[s]," though the limitations period begins only when the "false imprisonment [comes] to an end" with the initiation of legal process. *Id.* at 388–89.

Here, the Court cannot engage in the analysis it undertook in *Heck* and *Wallace* until it pins down which constitutional right of which McDonough alleges he was "depriv[ed]." 42 U.S.C. § 1983. Even if the Court were simply to apply "the standard rule that [accrual occurs] when the plaintiff has 'a complete and present cause of action,'" it would need to know which elements "complete" the cause of action. *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (brackets in original)).

Because McDonough has failed to complete even the first step of the 1983 analysis, the Court should refuse to skip ahead to his question regarding the accrual rule for his "fabrication of evidence" claim. "When the parties cannot be bothered to identify the source of their supposedly constitutional complaint," there is no reason to "enter[] a fight over an element of a putative constitutional cause of action that may not exist." *Cordova*, 816 F.3d at 666 (Gorsuch, J., concurring).

II. McDonough Has Failed to State a Cognizable 1983 Claim

Although McDonough still will not settle on a single constitutional theory, his merits brief now at least asserts that his claim rests on the proposition "that to initiate and maintain criminal proceedings against a defendant on the basis of fabricated evidence violates the Constitution." Pet. Br. 43. He offers two cursory suggestions for what provision of the Constitution that conduct might violate: the Due Process Clause and the Fourth Amendment.* Neither provision applies here. No Due Process Clause violation occurred because McDonough's criminal trial did not produce a *conviction* without due process of law. Moreover, McDonough says his claim rests on his allegation that proceedings against him were "initiate[d] and maintain[ed]" on the basis of fabricated evidence, but the Court has long held that the Due Process Clause does

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* McDonough also briefly gestures towards the Sixth Amendment, Pet. Br. 42–43 n.12, but he fails to explain how a Sixth Amendment "fair trial" violation could occur if the trial ends in an acquittal. And the Second Circuit case on which he relies, *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (cited in *Morse v. Fusto*, 804 F. 3d 538, 547 n.7 (2d Cir. 2015)), itself cites three of this Court's *Due Process Clause* cases for the proposition that "like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable 'corruption of the truth-seeking function of the trial process.'" *Ricciuti*, 124 F.3d at 130 (quoting *U.S. v. Augurs*, 427 U.S. 97, 104 (1976), and citing *Giglio v. United States*, 405 U.S. 150, 153 (1972), and *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

not impose constitutional requirements on the decision to bring criminal charges.

The Fourth Amendment does impose restrictions on pre-conviction *seizures*, and McDonough *may* have a Fourth Amendment claim lurking among the facts of this case; but he has not clearly articulated such a claim. And even if he had a Fourth Amendment claim, his "malicious prosecution" claim—which the lower courts dismissed as to Smith and which is currently pending against the other defendants—*is* his Fourth Amendment claim. Because McDonough has no free-standing "fabrication of evidence" claim, the Court should either dismiss the writ as improvidently granted or affirm the lower courts' dismissal of the claim.

A. McDonough does not have a Due Process Clause claim

The Fourteenth Amendment's Due Process Clause does not "protect[] against *all* deprivations of life, liberty, or property by the State," but "protects only against deprivations 'without due process of law.'" *Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (emphasis added) (quoting *Baker v. McCollan*, 443 U.S. 137, 145 (1979)), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). The Due Process Clause analysis therefore requires the Court to determine the precise deprivation at issue and then determine what process, if any, the Constitution makes "due." Of course, when a liberty deprivation consists of imprisonment pursuant to a criminal conviction,

due process encompasses the strict requirements the Constitution imposes on criminal trials. *See Albright v. Oliver*, 510 U.S. 266, 283 (1994) (Kennedy, J., concurring in the judgment). It is thus black-letter law that a person who is convicted and then confined because of destroyed or fabricated evidence—and who is later acquitted—may bring a Due Process Clause claim under section 1983. *See, e.g.*, *Heck v. Humphrey*, 512 U.S. 477 (1994); *Napue v. Illinois*, 360 U.S. 264 (1959).

Because McDonough was not convicted, however, he must identify some other deprivation. He may not simply assert that the defendant fabricated evidence: "[I]f an officer (or investigating prosecutor) fabricates evidence and puts that fabricated evidence in a drawer, making no further use of it, then the officer has not violated due process; the action did not cause an infringement of anyone's liberty interest." *Bianchi v. McQueen*, 818 F.3d 309, 319 (7th Cir. 2016) (quoting *Whitlock v. Brueggemann*, 682 F.3d 567, 582 (7th Cir. 2012) (brackets in original)). Notably, McDonough does not allege that his liberty deprivation consisted of pretrial detention; it appears, in fact, that McDonough was released on his own recognizance following his arraignment. Pet. Br. 40. He instead argues that "[b]eing subject to criminal proceedings on the basis of fabricated evidence was an ongoing deprivation of McDonough's liberty." *Id.* at 47. As the United States puts it, McDonough's purported liberty deprivation thus concerns the "*initiation of criminal proceedings*" itself. U.S. Br. 7; *see also* Pet. Br.

14–15 ("The 'gravamen' of his claim . . . is the 'wrongfulness' of the criminal proceedings against him.").

McDonough provides no reason, however, to conclude that the initiation and continuation of criminal proceedings, standing alone, constitute a deprivation of "liberty" under the Due Process Clause. All three of the Court's cases he cites in support of his Due Process Clause theory involved *convictions*. *See* Pet. Br. 41 (citing *Briscoe v. LaHue*, 460 U.S. 325, 326 n.1 (1983); *Miller v. Pate*, 386 U.S. 1, 7 (1967); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

Furthermore, notwithstanding McDonough's bald assertion that there is "no question that being indicted and criminally tried is a serious deprivation of liberty," *id.* at 40, at least three circuits have explicitly *rejected* his position, holding that "causing charges to be filed without probable cause will not without more violate the Constitution." *Castellano v. Fragozo*, 352 F.3d 939, 953–54 (5th Cir. 2003) (en banc); *see also Massey v. Ojaniit*, 759 F.3d 343, 354 (4th Cir. 2014) ("Fabrication of evidence alone is insufficient to state a claim for a due process violation; a plaintiff must plead adequate facts to establish that the loss of liberty—i.e., his conviction and subsequent incarceration—resulted from the fabrication."); *Alexander v. McKinney*, 692 F.3d 553, 557 n.2 (7th Cir. 2012) (holding that "the burden of appearing in court and attending trial" does not "in and of itself, constitute a deprivation of liberty," reasoning that "[i]t

would be anomalous to hold that attending a trial deprives a criminal defendant of liberty without due process of law, when the purpose of the trial is to effectuate due process"). Indeed, because initiating and maintaining a criminal prosecution is not itself a liberty deprivation, the Seventh Circuit has repeatedly rejected due process claims where, as here, the 1983 plaintiff was charged, arrested, arraigned, promptly released, and eventually acquitted. *See, e.g.*, *Bianchi*, 818 F.3d at 319–20; *Saunders-El v. Rohde*, 778 F.3d 556, 560 (7th Cir. 2015); *Alexander*, 692 F.3d at 557 & n.2.

These circuits have rejected Due Process Clause theories like McDonough's because this Court's precedents squarely foreclose them. The Court has specifically held that "injury to reputation by itself [i]s not a 'liberty' interest protected under the Fourteenth Amendment. . . . Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *Siegert v. Gilley*, 500 U.S. 226, 233 (1991); *see also Paul v. Davis*, 424 U.S. 693, 712, (1976) ("[T]he interest in reputation . . . is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law."). And if simply initiating a prosecution were a liberty deprivation, the Constitution necessarily would impose some standard or some procedural protections on the decision to bring criminal charges; but the Court has long rejected the idea that the Constitution provides for "judicial oversight or review of the decision to prosecute." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

Thus, in *Albright v. Oliver*, a majority of the Court specifically held that there is no "substantive due process right to be free of prosecution without probable cause." 510 U.S. 266, 271 (1994) (plurality opinion); *see also id.* at 281 (Kennedy, J., concurring in the judgment). And at least a plurality of the Court concluded that the "right to be free of prosecution without probable cause" could not be found within *procedural* due process principles either. *See id.* at 275 (Scalia, J., concurring) ("I think it unlikely that the procedures constitutionally 'due,' with regard to an arrest, consist of anything more than what the Fourth Amendment specifies."); *id.* at 283 (Kennedy, J., concurring in the judgment) ("[T]he due process requirements for criminal proceedings do not include a standard for the initiation of a criminal prosecution."); *see also Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018) (decision on remand) (Easterbrook, J.) (noting that there is "no such thing as a constitutional right not to be prosecuted without probable cause" (quoting *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013)).

Finally, even if McDonough could demonstrate that he suffered a "deprivation of liberty" prior to his acquittal, he would need to establish that he was not afforded the process the Constitution makes "due." And critically, "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the *Fourth Amendment* to address it." *Albright*, 510 U.S. at 274 (plurality opinion) (emphasis added). As the Court recently reiterated, "*Gerstein* and *Albright* . . .

both reflected and recognized" a "constitutional division of labor" between the Due Process Clause and the Fourth Amendment: The Due Process Clause establishes the procedures the government must follow before depriving an individual of life, liberty, or property as a result of a criminal conviction, while the Fourth Amendment "provides 'standards and procedures'" governing the deprivation of an individual's liberty or property "'*pending trial*.'" *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 n.8 (2017) (quoting *Gerstein*, 420 U.S. at 125 n. 27 (emphasis added in *Manuel*)).

In short, because any liberty deprivation McDonough may have suffered would be governed by the Fourth Amendment, any claim he might have would arise, if at all, under the Fourth Amendment.

B. Any Fourth Amendment claim McDonough may have is encompassed by his "malicious prosecution" claim

Although the circumstances of this case perhaps *could* give rise to a 1983 claim for a violation of the Fourth Amendment, the Court should refuse to assume the existence of such a hypothetical claim for the purpose of answering McDonough's accrual question. Because McDonough has never clearly articulated a Fourth Amendment theory, the parties have never had occasion to address what elements such a claim would have or brief whether McDonough has alleged facts sufficient to support those elements. And in any case, McDonough has *already* had a chance to pursue a Fourth Amendment claim—under the label

of "malicious prosecution"—which was dismissed as to Smith on absolute immunity grounds and remains pending against the other defendants.

Throughout this litigation McDonough has chosen not to frame his "fabrication of evidence" claim in Fourth Amendment terms. Particularly in light of the Second Circuit's affirmance of the dismissal of McDonough's "malicious prosecution" claim against Smith, it would be unfair to give McDonough a second bite at the apple by allowing him to refashion a claim he failed to articulate earlier.

The defendants have never had an opportunity to dispute the necessary elements of a Fourth Amendment claim, and there is little in the briefing before the Court addressing how the unique features of Fourth Amendment claims might affect when the limitations period for those claims begins. For example, without a "seizure," McDonough has no Fourth Amendment claim, *see, e.g., Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843–44 (1998), and while some courts have held that conditions of pretrial release (such as requirements to appear in court and restrictions on travel) may constitute Fourth Amendment "seizures," other courts have concluded that they do *not*, *see generally Becker v. Kroll*, 494 F.3d 904, 915–16 (10th Cir. 2007) (collecting cases on both sides of the question). It therefore would be inequitable to assume the existence of a Fourth Amendment theory without giving the defendants an opportunity to address this question.

It would also be impracticable for the Court to consider a possible Fourth Amendment theory at this point. McDonough did not characterize his "fabrication of evidence" claim as a Fourth Amendment claim below, "and those courts did not have occasion to address . . . what consequences might follow from" such characterization. *Byrd v. United States*, 138 S. Ct. 1518, 1526–27 (2018). "Because this is 'a court of review, not of first view,'" and because "it is generally unwise to consider arguments in the first instance" the Court should decline to consider any Fourth Amendment theory McDonough might pursue. *Id.* at 1527 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005)).

More fundamentally, McDonough's "malicious prosecution" claim *already* addresses any Fourth Amendment violation that may have occurred. As noted above, using the "malicious prosecution" label for any 1983 claim often generates confusion regarding the constitutional premise of the claim. *See supra* Part I.A. But here McDonough has consistently characterized his "malicious prosecution" claim as one based on a violation of the Fourth Amendment. *See, e.g.*, Pl.'s Opp'n to Mot. to Dismiss (ECF No. 108) 20. And the Second Circuit agrees that a "malicious prosecution" claim "essentially alleges a violation of the plaintiff's right under the Fourth Amendment to be free from unreasonable seizure." *Lanning v. City of Glens Falls*, 908 F.3d 19, 28 (2d Cir. 2018); *see also Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013) (holding that "to be actionable under section 1983

there must be a post-arraignment seizure, the claim being grounded ultimately on the Fourth Amendment's prohibition of unreasonable seizures").

McDonough has thus *already* had an opportunity to present a claim for a Fourth Amendment violation: The courts below dismissed that claim as to Smith, and McDonough continues to prosecute that claim against the other defendants. It is therefore not only unfair but also unnecessary for the Court to consider further Fourth Amendment arguments "this late in the day." *Clingman v. Beaver*, 544 U.S. 581, 598 (2005). The Court should refuse McDonough's invitation to do so. *See Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 237 (1st Cir. 2013); *Ferran v. Town of Nassau*, 11 F.3d 21, 23 (2d Cir.1993).

CONCLUSION

For these reasons, the writ should be dismissed as improvidently granted or the judgment of the Second Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INNOCENCE NETWORK AS AMICUS CURIAE SUPPORTING PETITIONER

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STATEMENT OF INTEREST

The Innocence Network (the "Network") is an association of organizations dedicated to providing *pro bono* legal and investigative services to individuals seeking to prove their innocence after having been wrongfully convicted.[1] Established in 2005, the Network's sixty-nine member organizations represent hundreds of convicted prisoners across all fifty states and the District of Columbia, as well as in Canada, New Zealand and the United Kingdom. The Network also works to redress more broadly the causes of wrongful convictions, as it and its members are dedicated to improving the reliability of the criminal justice system for future cases. Drawing on the lessons from cases in which innocent people were convicted, the Network promotes study and reform designed to enhance the truth-seeking functions of the criminal justice system and to ensure that wrongful convictions are prevented.

The Network has a unique perspective on the question presented in this case. Its member organizations have represented hundreds of individuals who have been wrongfully convicted, many due to fabrication of evidence by law enforcement officials. Further, from working with

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

wrongfully accused defendants and exonerees, the Network is intimately familiar with the major hurdles to litigating a 42 U.S.C. § 1983 claim while criminal proceedings are pending.

While the Network is focused primarily on proving the innocence of wrongfully convicted individuals, the Network also has an inherent interest in the ability of exonerees, including those whom it assists directly, to recover damages for the constitutional harms they have suffered. The availability of a damages remedy not only vindicates the rights of those exonerees, but also helps ensure that state officials (and in particular law enforcement officials) are aware of, and comply with, their constitutional obligations, consistent with the Network's mission. Such suits can thus help advance the Network's mission to help secure the release of wrongly convicted individuals as well as help prevent future wrongful convictions. And § 1983 suits may provide an opportunity to uncover the causes of a wrongful conviction beyond what is available during post-conviction litigation or the exoneration process. The Network thus has an inherent interest in ensuring the continued vitality of § 1983 claims involving wrongful prosecutions and convictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should apply the same type of favorable-termination rule to § 1983 fabrication claims like Petitioner's that is already universally applied to § 1983 wrongful-conviction claims.

For twenty-five years, courts around the country have applied this Court's rule from *Heck v. Humphrey* that § 1983 claims seeking damages attributable to a wrongful conviction—including claims that the conviction was based on fabricated evidence—do not accrue until the conviction has been invalidated. That delayed-accrual rule, patterned on the favorable-termination rule for common-law malicious-prosecution claims, promotes the goals of finality and consistency of judgments. In *Wallace v. Kato*, this Court clarified that the accrual rule for *all* § 1983 claims should be determined through the process, used in *Heck*, of analogizing to the closest common-law tort. In the ensuing twelve years, courts (including the Third, Sixth, Ninth and Tenth Circuits) have repeatedly held that § 1983 fabrication claims challenging criminal proceedings are most analogous to claims for malicious prosecution, and thus the same type of favorable-termination requirement that applies to wrongful-conviction claims should apply to all claims that fabricated evidence caused wrongful criminal proceedings.

The Second Circuit, however, reached an opposite result. The Second Circuit created an immediate accrual rule for § 1983 fabrication claims pertaining to pretrial detention without ever analogizing to the common law, as this Court instructed to do in *Wallace*, or considering the effect of the delayed-accrual rule for wrongful-conviction claims that this Court laid out in *Heck*. The rule the Second Circuit devised—that these fabrication claims accrue as soon as the plaintiff "becomes aware of [the] tainted evidence and its improper use" and "his liberty has been deprived in some way," *McDonough v. Smith*, 898 F.3d 259, 266-

67 (2d Cir. 2018)—sets accrual at a time very early on in the criminal process. In other words, the Second Circuit's accrual rule for § 1983 claims alleging that fabricated evidence caused a pretrial liberty deprivation is the exact opposite of the universal accrual rule for § 1983 claims alleging that fabricated evidence caused a wrongful conviction. Under the Second Circuit's rule, accrual occurs at the beginning of the criminal process. Under the *Heck* rule, accrual of § 1983 wrongful-conviction claims is delayed until the end of the criminal process—after the conviction has been invalidated.

Applying opposite accrual rules to claims challenging the same unconstitutional conduct, based on whether a criminal conviction is then in effect, leads to arbitrary, irrational and fundamentally unjust results. As case examples of actual exonerees represented by the Innocence Network illustrate, applying the Second Circuit's accrual rule would leave many exonerees with either a severely limited remedy or no remedy at all.

For example, take an exoneree, like Juan Rivera, whose 20 continuous years of wrongful incarceration were the result of three successive wrongful convictions for the same murder (based on the same fabricated evidence) before he was ultimately exonerated by DNA. As described more fully below, combining the *Heck* rule, which delays accrual only while a conviction is in effect, with the Second Circuit's rule, which holds that claims for fabrication causing pretrial detention accrue as soon as the evidence is used, would leave Rivera at the time of his exoneration with a § 1983 remedy for only the final

2 ½ years of his wrongful imprisonment—those attributable to his third and final wrongful conviction.

Or consider exonerees, like Anthony Wright and John Restivo, whom prosecutors unreasonably sought to re-try after exonerating evidence led to the vacatur of their convictions. Because the *Heck* rule alone delays accrual only until the time the wrongful conviction is invalidated, if the Second Circuit's rule applied, such continued prosecution could easily stretch until after the time for bringing a § 1983 suit expired. These exonerees would be left with an intolerable choice: focus on defending against charges seeking to imprison them for crimes they did not commit and forego any constitutional remedy for the years already lost, or bring a § 1983 suit before the charges are dismissed and risk compromising their criminal defense.

In addition, the Second Circuit's rule would leave many exonerees without a remedy for time they spent in pretrial detention. For some exonerees that time can be substantial—for example, Jonathan Barr spent 4 years detained pretrial before his wrongful conviction. And should a criminal defendant win an acquittal after years of pretrial detention, under the Second Circuit's rule, by that time it would already be too late to sue.

In each case, the unconstitutional misconduct—the use of fabricated evidence to detain unlawfully—is the same. And the harm suffered by the plaintiff—namely years of wrongful detention—is also the same. But under the Second Circuit's rule, exonerees under any of the above circumstances would be substantially worse off than the typical exoneree who spends years

imprisoned based on a single wrongful conviction before the near simultaneous vacatur of the conviction and dismissal of all charges.

The Network respectfully submits that the Second Circuit's decision is erroneous. For all the same reasons that accrual is already delayed for § 1983 wrongful-conviction claims, accrual should be delayed for any § 1983 claim alleging that fabricated evidence caused wrongful criminal proceedings.

ARGUMENT

I. THE PROTOTYPICAL SECTION 1983 FABRICATION OF EVIDENCE CLAIM INVOLVES A WRONGFUL CONVICTION

As far back as *Mooney v. Holohan*, this Court has made clear that a conviction based on fabricated evidence violates the Due Process Clause: "if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury . . . [s]uch a contrivance . . . is inconsistent with the rudimentary demands of justice." 294 U.S. 103, 112 (1935); *see also Miller v. Pate*, 386 U.S. 1, 7 (1967) ("More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.") (internal citations omitted); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (calling the principle that the government "may not knowingly use false evidence . . . to obtain a tainted conviction . . . implicit in any concept of ordered liberty"). As one circuit court summarized, "if any concept is fundamental to our American system of

justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Limone v. Condon*, 372 F.3d 39, 44–45 (1st Cir. 2004).

Unsurprisingly, all eleven circuits to consider the issue have found that an individual who was convicted based on deliberately fabricated evidence has a cognizable cause of action under § 1983. *See, e.g.*, *Whitlock v. Brueggemann*, 682 F.3d 567, 585 (7th Cir. 2012) (noting that "all courts that have directly confronted the question . . . agree that the deliberate manufacture of false evidence contravenes the Due Process Clause"); *see also Limone*, 372 F.3d at 45; *Bellamy v. City of New York*, 914 F.3d 727, 745 (2d Cir. 2019); *Halsey v. Pfeiffer*, 750 F.3d 273, 294 (3d Cir. 2014); *Washington v. Wilmore*, 407 F.3d 274, 282 (4th Cir. 2005); *Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003) (en banc); *Gregory v. City of Louisville*, 444 F.3d 725, 744–45 (6th Cir. 2006); *Wilson v. Lawrence Cty.*, 260 F.3d 946, 954 (8th Cir. 2001); *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017); *Pierce v. Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004); *Jones v. Cannon*, 174 F.3d 1271, 1289 (11th Cir. 1999).

As this Court has explained, "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980). Such a remedy acts both "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158,

161 (1992). An established body of academic work, some of it based on empirical studies, confirms that § 1983 suits are an effective means of deterring official misconduct. *See, e.g.*, Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 Wis. L. Rev. 35, 101–02 (discussing the role of § 1983 suits in uncovering and preventing police misconduct that "predictably causes . . . wrongful convictions"); Joanna C. Schwartz, *What Police Learn From Lawsuits*, 33 Cardozo L. Rev. 841, 661-62 (2012) (showing, based on data of law enforcement agencies, that lawsuits serve an important role in deterring police misconduct that civil complaints and use-of-force reports cannot fulfill); Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 B.Y.U. L. Rev. 1443, 1487 (damages imposed via constitutional tort suits have a greater deterrent effect on police misconduct than mere exclusion of constitutionally impermissible evidence).

II. SECTION 1983 CLAIMS FOR WRONGFUL CONVICTION BASED ON FABRICATED EVIDENCE FOLLOW A DEFERRED ACCRUAL RULE UNDER *HECK V. HUMPHREY*

In *Heck v. Humphrey*, this Court established an unambiguous delayed-accrual rule for § 1983 claims—like the prototypical fabrication-of-evidence claim—seeking compensation for injuries due to a wrongful conviction: "[A] § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or

sentence has been invalidated." 512 U.S. 477, 489–90 (1994).

While serving a 15-year sentence for voluntary manslaughter, petitioner Roy Heck brought a *pro se* § 1983 suit for money damages, alleging that investigative misconduct by prosecutors and investigators had caused him to be wrongly convicted. *Id.* at 478–49. Noting that "[o]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights," this Court looked to the common law of torts to fashion an accrual rule for such § 1983 wrongful-conviction claims. *Id.* at 483 (internal citation and quotation marks omitted). The Court found "[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because . . . it permits damages for confinement imposed pursuant to legal process." *Id.* at 484. And "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Id.*

Drawing on this analogy, the Court issued a rule focused specifically on § 1983 claims, like Heck's, challenging a conviction: "in order to recover damages for allegedly unconstitutional conviction or imprisonment . . . a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486–87. The Court clarified that this was a rule of

delayed accrual: "the statute of limitations poses no difficulty" for such § 1983 wrongful-conviction claims because, until the conviction or sentence has been invalidated, "the § 1983 claim has not yet arisen." *Id.* at 489.

The Court made clear that the procedure of determining an accrual rule by analogy is no empty formality. Rather, it provides a way to incorporate the claim-processing wisdom fine-tuned "[o]ver the centuries" in the common law. *Id.* at 483; *see also Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 921 (2017) (describing the common law "as a source of inspired examples" for § 1983 claims) (internal citation and quotation mark omitted). The Court explained how the same concerns that had led to the adoption of a favorable-termination requirement for common-law malicious-prosecution claims—avoiding parallel litigation, promoting finality and consistency, while preventing collateral attacks on criminal proceedings through independent civil suits—supported applying a like rule to § 1983 suits. *Heck*, 512 U.S. at 485–86.

In the twenty-five years since *Heck* was decided, courts have consistently applied "the now well-known rule that when an otherwise complete and present § 1983 cause of action would impugn an extant conviction, accrual is deferred until the conviction or sentence has been invalidated." *Bradford v. Scherschligt*, 803 F.3d 382, 386 (9th Cir. 2015). As a result, § 1983 claims that fabricated evidence caused a wrongful conviction do not accrue—and the statute of limitations does not begin to run—until that conviction is vacated. *Id.*; *see also, e.g.*, *Savory v. Cannon*, 912 F.3d 1030, 1034 (7th Cir. 2019); *Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017);

Castellano, 352 F.3d at 959–60; *Figueroa v. Rivera*, 147 F.3d 77, 80-81 (1st Cir. 1998).[2]

This deferred-accrual rule is not limited to claims alleging fabrication of evidence. For example, courts have consistently held that § 1983 suits alleging *Brady* violations likewise do not accrue until the wrongful conviction is invalidated. *See, e.g.*, *Figueroa*, 147 F.3d at 80–81; *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 388–92 (4th Cir. 2014); *Poventud v. City of New York*, 750 F.3d 121, 132–34 (2d Cir. 2014) (en banc); *Jordan v. Blount Cty.*, 885 F.3d 413, 415-16 (6th Cir. 2018); *Savory*, 912 F.3d at 1034; *Buckley v. Ray*, 848 F.3d 855, 867 (8th Cir. 2017); *Rosales-Martinez v. Palmer*, 753 F.3d 890, 895–96 (9th Cir. 2014); *Smith v. Gonzales*, 222 F.3d 1220,

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[2] Despite universal recognition that the *Heck* bar must be lifted before a § 1983 claim may be brought, courts have not treated favorable termination as a substantive element of § 1983 wrongful-conviction claims, as the Petitioner advocates at Pet. Br. 35–44. *See, e.g.*, *Halsey*, 750 F.3d at 294, 296–97 (compare description of elements of § 1983 fabrication claim—that plaintiff "has been convicted at a trial at which the prosecution has used fabricated evidence" and "there is a reasonable likelihood that, without the use of that evidence, [he] would not have been convicted"—with later description of § 1983 malicious prosecution claim, which includes element of favorable termination); *see also Mills*, 869 F.3d at 484 ("The basis of a fabrication-of-evidence claim under § 1983 is an allegation that a defendant knowingly fabricated evidence against [a plaintiff], and [that] there is a reasonable likelihood that the false evidence could have affected the judgment of the jury.") (internal quotation marks and citation omitted); *Spencer*, 857 F.3d at 798 ("To prevail on a § 1983 claim of deliberate fabrication, a plaintiff must prove that (1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty.").

1221–23 (10th Cir. 2000); *Porter v. White*, 483 F.3d 1294, 1304 n.6 (11th Cir. 2007).

Perhaps unsurprisingly for a case "at the intersection of the two most fertile sources of federal-court prisoner litigation" (§ 1983 and habeas corpus), *Heck*, 512 U.S. at 480, *Heck* has now been cited tens of thousands of times. Over that time, it has become clear that the deferred-accrual rule embodied in *Heck* generally has salutary consequences. It simultaneously provides a simple way to dismiss many frivolous claims and permits those with meritorious claims—like exonerees—to bring timely suits once they are finally able to win their release, often many years after they were wrongly convicted.

The rationales animating *Heck* would apply equally to any challenge to ongoing criminal proceedings. Indeed, the common-law favorable-termination rule, from which the *Heck* rule was drawn, applies to any criminal proceeding. But the precise holding of *Heck* hinges on the existence of a conviction. *See, e.g.*, *Wallace v. Kato*, 549 U.S. 384, 393 (2007) ("[T]he *Heck* rule for deferred accrual is called into play only when there exists 'a conviction or sentence that has *not* been . . . invalidated,' that is to say, an 'outstanding criminal judgment.'") (quoting *Heck*, 512 U.S. at 486–87) (alteration in original). In other words, courts have interpreted the holding of *Heck* to defer accrual of a § 1983 claim only during the time period between the trial and the invalidation of that conviction—even if the same criminal proceedings stretch on both before and after that time. *See, e.g.*, *Bradford*, 803 F.3d at 386 ("*Heck* applies only when there is an extant conviction.").

III. THE "FAVORABLE TERMINATION" RULE SHOULD APPLY TO ANY SECTION 1983 CLAIM THAT FABRICATED EVIDENCE WAS USED IN CRIMINAL PROCEEDINGS

A. Section 1983 fabrication claims seeking damages for pretrial detention present a distinct question, but the same accrual rule should apply

In addition to the universally recognized § 1983 cause of action for fabrication of evidence that causes a wrongful conviction, many circuits also recognize a § 1983 claim where fabricated evidence causes a *pre-trial* liberty deprivation (regardless of an ultimate conviction). *See Black v. Montgomery Cty.*, 835 F.3d 358 (3d Cir. 2016) ("The harm . . .occurs whether or not one is convicted."); *Cole v. Carson*, 802 F.3d 752, 767–68 (5th Cir. 2015) ("[A] victim of intentional fabrication of evidence by officials is denied due process when he is either convicted or acquitted."), *vacated on other grounds sub nom Hunter v. Cole*, 137 S. Ct. 497 (2016); *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1328 (11th Cir. 2015) (fabrication of evidence causing pretrial liberty deprivation cognizable under Due Process Clause); *cf Lewis v. City of Chicago*, 914 F.3d 472, 476–80 (7th Cir. 2019) (holding that the Fourth Amendment, not the Due Process Clause, exclusively covers claims for pretrial detention).

The claim that fabricated evidence caused a *pre-trial* liberty deprivation is what is at issue here, as Petitioner was never convicted. Petitioner alleges that Respondent fabricated false affidavits and other evidence in order to wrongly cause him to be charged

with election fraud. *McDonough*, 898 F.3d at 263–64. Although Petitioner was tried twice on those charges—and suffered a liberty deprivation to the extent "he was arrested and stood trial"—the first trial ended in a mistrial and the second trial ended in an acquittal. *Id.* at 264, 266.

As a result, the deferred-accrual rule for § 1983 wrongful-conviction claims established by this Court in *Heck* is not directly implicated by Petitioner's case. As the Second Circuit noted, "McDonough was never convicted, so *Heck* is not called into play." *McDonough*, 898 F.3d at 269 (internal quotation marks omitted).

B. Under the *Wallace* framework, any Section 1983 fabrication claim is analogous to malicious prosecution, and accrues upon favorable termination of the criminal proceeding

In *Wallace v. Kato*, this Court clarified that the same process the Court applied to determine the accrual rule in *Heck*—analogizing to the closest common-law claim—was the way to determine the accrual rule for *any* § 1983 claim. Just as the Court analogized to malicious-prosecution claims for the wrongful-conviction claims at issue in *Heck*, malicious prosecution provides the appropriate analogy for claims that fabrication of evidence cause *any* wrongful criminal proceedings. *See* Pet. Br. 23–28. That is the conclusion reached by every other circuit to examine this question after *Wallace*. *See, e.g.*, *Floyd v. Attorney General*, 722 F. App'x 112, 113 (3d Cir. 2018) (per curiam); *Bradford*, 803 F.3d at 387–88; *Mills*, 869

F.3d at 484; *Mondragón v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008).

IV. THE SECOND CIRCUIT DECISION WOULD DEPRIVE SOME EXONEREES OF A REMEDY AND CREATE STARKLY DIVERGENT OUTCOMES FOR SIMILARLY SITUATED PLAINTIFFS

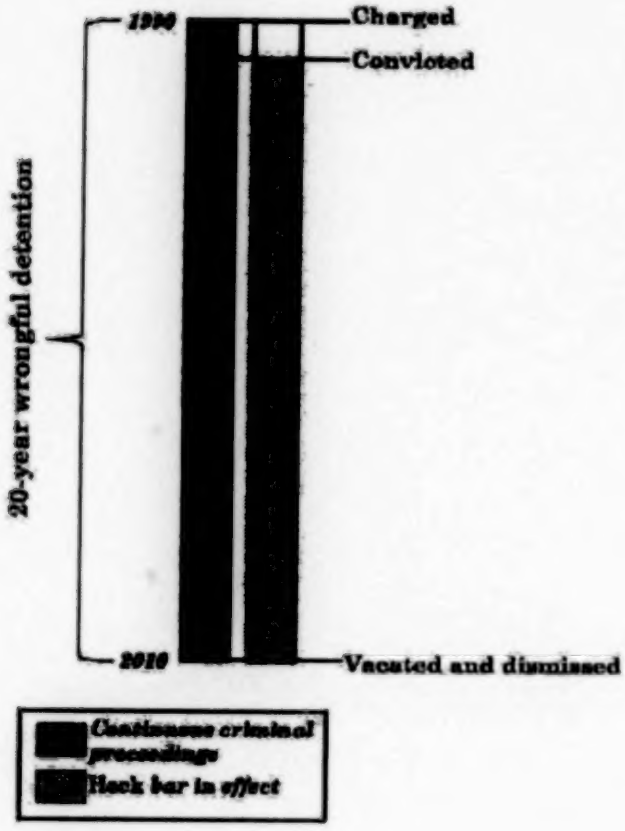
A. Deviation from the *Heck/Wallace* framework would result in irreconcilable results in Section 1983 lawsuits arising from prosecutions based on fabricated evidence

Given the clear deferred-accrual rule provided by *Heck* during the period a conviction is in effect, many exonerees would be largely unaffected by the adoption of the Second Circuit's accrual rule for pretrial § 1983 fabrication claims. But others could be left with a drastically reduced remedy or even no remedy at all. Exploring how the result in this case might affect exonerees highlights how applying different accrual rules for § 1983 fabrication claims—depending on whether the damages sought involved a wrongful conviction—would produce irrational, arbitrary and unjust results.

A person prosecuted based on fabricated evidence typically is detained for some period of time pretrial, then convicted. That person then typically fights for years to prove his innocence before ultimately winning release (if ever). In the simplest case, the deferred-accrual rule of *Heck* would control and ensure there was access to a § 1983 remedy after the exoneration. If the exoneree had spent his years

imprisoned as the result of one conviction, and had that conviction vacated and the charges dismissed simultaneously, then under the *Heck* rule he could timely bring suit seeking damages for his wrongful conviction after the exoneration.

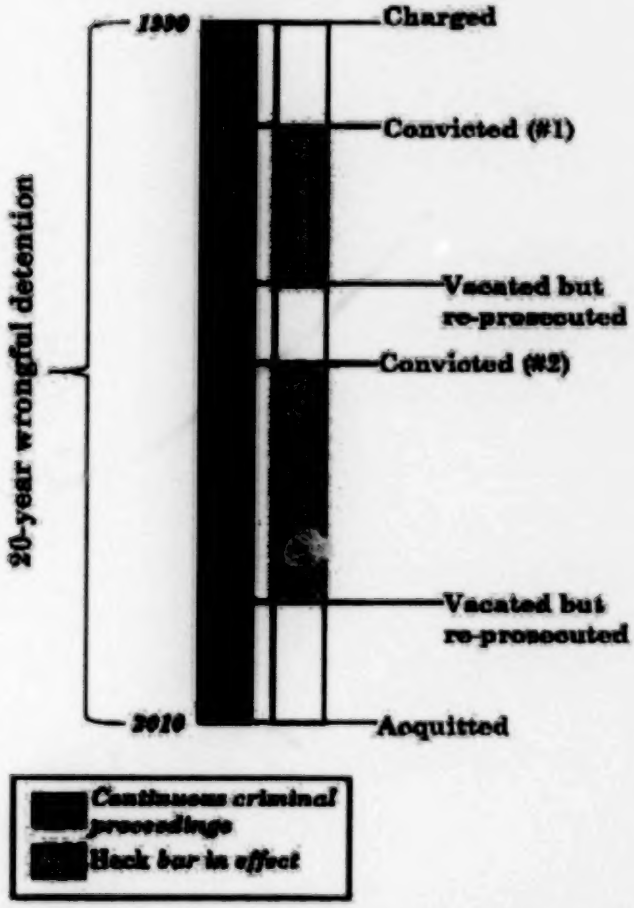
Chart 1: Simple Case



As depicted in Chart 1, in that simple case, the total time of detainment is almost completely congruent with the time that claim accrual is delayed by the *Heck* bar. Based solely on the *Heck* rule, then, the exoneree can seek compensation in a § 1983 suit brought after his exoneration for virtually all of the damages he actually suffered. And because in that simple example the vacatur of the conviction (which lifts the *Heck* bar) is simultaneous with the dismissal of charges, the exoneree would have ample time to file a § 1983 suit after he was exonerated.

But not all cases are so simple. Innocent people incarcerated for crimes they did not commit often fight, tirelessly, to obtain their release. As a result, the procedural history of their cases can be quite complex. For example, the same fabricated evidence can lead to a series of wrongful convictions for the same crime, rather than one wrongful conviction. Or the prosecution can continue for years after the wrongful conviction is vacated, before the exoneree is ultimately acquitted at trial or the charges are dismissed. And some exonerees have spent years detained pretrial before their wrongful convictions.

Chart 2: Complex Case



As Chart 2 demonstrates, in cases with those procedural complexities, the *Heck*-bar alone no longer roughly covers the entirety of the wrongful prosecution and detention. The *Heck*-bar only applies from the time of conviction through vacatur of that specific conviction, and does not delay accrual while there is no conviction in effect (even though criminal proceedings and detention both continue). Applying a favorable-termination rule to all § 1983 fabrication

claims—as every other circuit to examine the issue after *Wallace* has done—delays accrual of the § 1983 claim until after the exoneration. That means that an exoneree can timely bring suit after his complete exoneration, and seek compensation for the entirety of the time spent wrongly detained based on fabricated evidence—*i.e.*, the entirety of the blue bar depicted in Chart 2.

In contrast, the Second Circuit's accrual rule would artificially divide a continuous wrongful detention—all due to the same fabricated evidence—into separate claims that accrue at different points. It would also subject victims of similar constitutional deprivations to meaningfully disparate accrual rules, based on circumstances over which they have no control and which are, in essence, pure happenstance. As the cases below illustrate, the Second Circuit's rule would effectively preclude some exonerees from vindicating their constitutional deprivations, merely because of the specific legal process to which they were subjected.

B. Continuous incarceration based on a series of separate convictions—the case of Juan Rivera[3]

Juan Rivera spent 20 years wrongly imprisoned for a rape-murder he did not commit, before he was ultimately exonerated by DNA evidence. Although Rivera was continuously in custody, always under a single indictment, his imprisonment was the result of

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[3] All facts are taken from pleadings filed on the docket at *Rivera v. Lake County*, No. 12-cv-8665 (HDL) (N.D. Ill. 2012), unless otherwise noted.

three successive convictions for the same crime. He ultimately brought a § 1983 fabrication claim, after his exoneration, seeking damages for this wrongful imprisonment. Under the Second Circuit's rule, in combination with the existing *Heck* rule, his fabrication claims would have accrued separately for each wrongful conviction at the time it was reversed, and therefore the statute of limitations for all but the third and final wrongful conviction would have long expired by the time he was exonerated.

On August 17, 1992, 11-year-old Holly Staker was violently raped and murdered while babysitting two young children. After months without solving this horrific crime, Lake County, Illinois detectives turned to Rivera, a 19-year-old former special-education student who had recently moved to the county from Puerto Rico. Detectives interrogated Rivera relentlessly until, after 3:00 a.m. on the fourth day of ongoing interrogation, he was left catatonic in his cell, having ripped pieces of his own scalp from his skull. Detectives then wrote out a fabricated confession which they forced Rivera to sign. That confession was so inconsistent with the facts of the crime that investigators later re-wrote it and had Rivera sign it again.

Rivera was tried for Staker's murder three times, with the fabricated confession consistently serving as the linchpin. Rivera was first convicted on November 19, 1993, receiving a life sentence. Three years later, that conviction was reversed for cumulative trial errors. Rivera was tried and convicted a second time on October 2, 1998, and again sentenced to life imprisonment.

Nearly seven years later, in May 2005, DNA tests confirmed that the semen recovered from Staker's body was not Rivera's, proving Rivera's innocence. The trial court vacated Rivera's conviction and ordered a new trial.

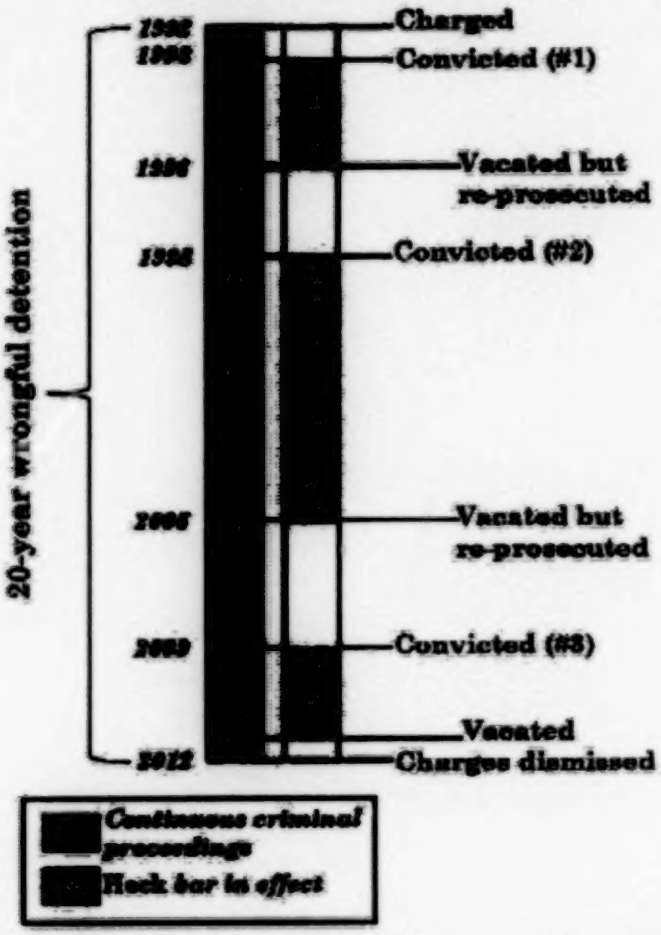
Despite this exonerating DNA, prosecutors refused to drop the charges. They speculated that 11-year-old Staker may have had consensual sex before she was raped and murdered or, in the alternative, that lab technicians could have contaminated the sample with someone else's semen. Neither argument was supported by any fact or expert evidence. Nevertheless, in 2009 a jury again credited the fabricated confession and found Rivera guilty. On appeal, the Illinois Appellate Court held unanimously that Rivera's conviction was "unjustified and cannot stand" because a rational jury could not have convicted him. *People v. Rivera*, 962 N.E.2d 53, 67 (Ill. App. Ct. 2011).

Rivera was finally released from prison on January 6, 2012, nearly 20 years after he was first wrongly incarcerated based on the confession detectives fabricated—but only two-and-a-half years after his most recent wrongful conviction.

Following his release from prison, Rivera brought a § 1983 wrongful conviction suit against the detectives who framed him by fabricating the false confession. According to Rivera, the fabricated evidence caused not only the deprivation of his liberty for nearly 20 years, but also subjected him, during his incarceration, to "attempts on my life [as well as] attempted rapes and all kind of different actions that

I went through in prison."[4] The lawsuit was settled before trial in March 2015.

Chart 3: Juan Rivera's Case



Had the Second Circuit's accrual rule been applied to Rivera's case, only damages attributable to

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[4] Paul Meincke, *Juan Rivera Wins Largest Wrongful Conviction Settlement in U.S. History*, ABC7 Chicago (Mar. 20, 2015), https://perma.cc/LQ59-TBDW.

the final two-and-a-half years of his wrongful incarceration would have been compensable—even though there was no point during his 20-year ordeal when he could have litigated a § 1983 suit. Under *Heck*, accrual is deferred only while a conviction is in place; that bar lifts at the time of vacatur. The combination of the Second Circuit's rule with the existing *Heck* rule would mean each wrongful-conviction cause of action would accrue separately upon each reversal—even though Rivera remained detained and remained subject to continued prosecution based on the same fabricated evidence. In effect, under the Second Circuit's rule, Rivera would be penalized for having fought his case vigorously enough to win two reversals before his ultimate exoneration. In contrast, under the majority rule, which requires favorable termination for all § 1983 fabrication claims, Rivera's § 1983 fabrication claim covering the entirety of the wrongful prosecution and detention would not accrue until after the charges were dismissed.

C. Lengthy prosecution after vacatur

1. The case of Anthony Wright[5]

Anthony Wright spent more than 25 years wrongly imprisoned for a rape-murder he did not commit, until he was ultimately exonerated by incontrovertible DNA evidence identifying the true perpetrator. But despite the exonerating evidence that led the court to vacate his conviction, the

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[5] All facts are taken from pleadings filed on the docket at *Wright v. City of Philadelphia*, No. 16-cv-5020 (GEKP) (E.D. Pa. 2016), unless otherwise noted.

prosecutor insisted on retrying Wright. He, too, ultimately brought a § 1983 fabrication claim following his second trial. Although *Heck* defers accrual until vacatur, under the Second Circuit's rule, accrual would not be delayed further even though Wright remained jailed and was facing re-prosecution—forcing him to choose between fully litigating the ongoing criminal proceeding in which he was enmeshed and potentially forfeiting his § 1983 claim if the statute of limitations ran on his claim before he could win an acquittal.

On October 18, 1991, Louise Talley, a 77-year-old widow living alone, was brutally raped and murdered in her home in North Philadelphia. Philadelphia Police Department ("PPD") detectives quickly zeroed in on Wright, a 20-year-old African-American father who used to live in the neighborhood, even though he had no ties to Ms. Talley or the crime.

After hours of unsuccessful interrogation, detectives handcuffed Wright to a chair and presented him with a nine-page fabricated confession, handwritten by one of the detectives. When Wright refused to sign, one of the detectives screamed that he would "rip [his] eyes out" and "skull-f**k" him. Under this coercion, Wright signed the confession. It claimed Wright had raped Talley and had worn specific clothing—a Chicago Bulls shirt, a pair of blue jeans with black suede patches and black Fila sneakers—during the crime. This clothing had been found in the victim's home after the crime, but to shore up the fabricated confession, PPD detectives fabricated vouchers to falsely indicate that these items were found during a search of Wright's bedroom.

On the basis of this fabricated evidence, Wright was prosecuted on capital charges for the Talley rape-murder. Wright testified in his defense, asserting his innocence and describing how his confession had been coerced and fabricated, and that the clothes police claimed they had found in his room were not his. He was convicted of all charges on June 18, 1993, coming within a few votes of the death penalty. Wright was ultimately sentenced to life without parole.

For two decades, Wright pursued every possible avenue for post-conviction relief. Finally, in January 2013, DNA testing of the single, male DNA profile recovered from a vaginal swab of Talley conclusively excluded Wright as the source of that DNA. Three months later, that DNA profile was matched to Ronnie Byrd—a local crack-cocaine addict with a violent criminal history who, at the time, had been squatting in an abandoned building near Talley's home.

Subsequent DNA testing provided further proof not only of Wright's innocence, but that PPD detectives had intentionally fabricated the evidence against him. In August 2014, interior portions of the clothing detectives claimed they had recovered from Wright's bedroom were tested for "wearer" DNA. The DNA testing on all three items of clothing proved what Wright had always claimed: that he had never worn the clothes. Instead, the DNA testing showed the victim, Talley, had worn all three items.

Wright's conviction was vacated on September 22, 2014, based on this DNA evidence of his innocence. In a stunning turn, however, the Philadelphia District

No. 18-485

In the Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the statute of limitations for a § 1983 due process claim based on the alleged use of fabricated evidence to effect a deprivation of liberty begins to run when (1) the defendant discovers that fabricated evidence has been used to effect the deprivation, or (2) later, when criminal proceedings (if any) are terminated in the defendant's favor.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Amici are nonprofit organizations whose mission is to advance the interests of local governments and the public that is dependent on their services. *Amici* monitor and analyze legal developments that impact local governments and advocate for greater protection of government officials as they serve the public.

Amici's member governments, law enforcement agencies, and public attorneys serve on the front lines of the daily battles over government searches and seizures and the § 1983 claims brought to challenge them. As such, *amici* have a strong institutional interest in two issues presented here.

First, as representatives of the public entities and officials against whom § 1983 claims are brought, *amici* have a substantial interest in ensuring that the scope of § 1983 liability is limited to particular violations of "the Constitution and laws," as Congress intended, and does not (as Petitioner would have it) encompass ordinary common-law tort claims. 42 U.S.C. § 1983.

Second, *amici* have a particularized interest in the rules for determining accrual of those constitutional claims. Specifically, *amici* advocate for an accrual rule that both allows for the orderly administration of

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* All parties have consented to the filing of this brief. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

justice and faithfully reflects the "values and purposes" of the constitutional right at issue. By arguing for a freestanding "fabrication of evidence" § 1983 claim (which he attempts to contort into an equally freestanding "malicious prosecution" claim) that may accrue years after any cognizable injury, McDonough advocates for a § 1983 regime that is divorced from its constitutional roots; is inconsistent with the values embodied in the due process right actually at issue here; and would impose severe practical and administrative burdens on the state and local organizations and officials who must defend § 1983 claims.

Remarkably, McDonough invokes the needs of "local officials" in support of his proposed delayed-accrual rule. As organizations representing the interests of many of those officials, *amici* emphatically reject McDonough's attempt to co-opt their members in the service of an accrual rule that would vitiate the protections of the statute of limitations, impair their ability to defend § 1983 claims, and impose upon them indefinite and unmanageable administrative burdens.

For these reasons, *amici* urge that the Court affirm the Second Circuit's determination that the only claim presented here—a due process claim—accrued (if it was viable at all) no later than the date on which he became aware that the allegedly fabricated evidence was used to deprive him of a protected liberty interest.

* * *

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 State municipal leagues, the

NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all U.S. cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

SUMMARY OF ARGUMENT

McDonough's § 1983 "fabrication of evidence" claim avoids what this Court has repeatedly emphasized is the "threshold inquiry" in assessing a § 1983 claim: "identify[ing] the specific constitutional right at issue." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). There is no freestanding § 1983 cause of action for "fabrication of evidence" or "malicious prosecution" divorced from an alleged violation of a particular constitutional right. By attempting to frame his claim in terms of state common law torts, without regard to any specific constitutional violation, McDonough seeks to improperly expand the scope of § 1983 to encompass general tort grievances against state and local officials, contrary to both the statutory text and this Court's jurisprudence.

The only arguably cognizable § 1983 claim presented here is the one the Second Circuit resolved—a due process claim. To the extent there is a viable due

process claim at issue, it is the only claim this Court can or should address.

The Second Circuit correctly applied the "standard" accrual rule to McDonough's due process fabrication of evidence claim, holding that his claim accrued when he learned that fabricated evidence had been used to deprive him of liberty. There is no basis for applying the "refinements" to the standard rule embodied in this Court's decisions in *Wallace v. Kato*, 549 U.S. 384 (2007), and *Heck v. Humphrey*, 512 U.S. 477 (1994). Neither decision involved a due process fabrication of evidence claim, and both involved material circumstances not present here.

The delayed-accrual rules proposed by McDonough are not consistent with the asserted due process right, and would constitute bad public policy. The indefinite delay in accrual that would result from McDonough's proposed "favorable termination" and "continuing tort" accrual rules would reduce legal certainty, make legitimate § 1983 claims more difficult to prove and to defend, and impose undue administrative costs on the state and local entities and officials who bear the burden of defending such claims.

ARGUMENT

I. Determining the accrual date for McDonough's claim requires first identifying the particular constitutional right allegedly violated—here, the right to due process.

A. There is no freestanding § 1983 claim for "fabrication of evidence" or "malicious prosecution."

This Court has consistently emphasized that § 1983 does not create a generalized tort action

against government officials. *See, e.g., Rehberg v. Paulk*, 566 U.S. 356, 366 (2012) (Section 1983 is not "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more."). Both the statutory text and principles of sovereign immunity require that any action brought under § 1983 be rooted in a particular constitutional or statutory right. *See* 42 U.S.C. § 1983 (creating cause of action for a deprivation of rights "secured by the Constitution and laws"). Consistent with that requirement, the "threshold inquiry" in any § 1983 suit is to "'identify the specific constitutional right' at issue." *Manuel*, 137 S. Ct. at 920 (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994)).

Petitioner willfully avoids this "threshold inquiry." He characterizes his § 1983 claim as a "fabrication of evidence" claim, which he then argues should be treated for accrual purposes as a "malicious prosecution" claim. Br. of Pet'r 23. But there is no such thing as a "fabrication of evidence" or "malicious prosecution" claim under § 1983. *See, e.g., Rehberg*, 566 U.S. at 366. There is only a claim that by fabricating evidence or prosecuting the complainant, an official has violated a specific federal constitutional or statutory right.

There is a role in § 1983 actions for analogizing to common-law torts to determine the elements of the constitutional claim. But Petitioner's approach would effectively *substitute* the analogous tort for the constitutional claim, in derogation of both the statutory text and this Court's jurisprudence. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 271–72 ("[Section] 1983 provides a uniquely federal remedy . . . [that] can have

no precise counterpart in state law.") (citations omitted) (internal quotation marks omitted); *id.* at 272 ("[I]t is 'the purest coincidence' when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect.") (quoting *Monroe v. Pape*, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring)). As a number of courts and commentators have pointed out, this practice of substituting common-law torts for constitutional torts is not only inconsistent with the statutory text and governing precedent, but also "invites confusion" and obscures the required constitutional analysis. *Castellano v. Fragozo*, 352 F.3d 939, 954 (5th Cir. 2003) (en banc); *see also, e.g., Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009) ("[I]f a plaintiff can establish a violation of the fourth (or any other) amendment there is nothing but confusion gained by calling the legal theory 'malicious prosecution.'") (quoting *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2009)). McDonough's attempt to characterize his claim as an extra-constitutional "fabrication of evidence" claim and then to re-characterize that claim as an equally extra-constitutional (and immunity-barred) "malicious prosecution" claim is another example of the confusion that results from divorcing § 1983 from its constitutional foundations. *See Castellano*, 352 F.3d at 954; *Parish*, 594 F.3d at 554.

Any right of recovery arising from official conduct necessarily arises from the particular right asserted. By arguing that it *does not matter* which specific constitutional violation is alleged, *see* Br. of Pet'r 3, 19, 42, McDonough seeks to transform § 1983 into a vehicle for generalized tort grievances against the gov-

ernment—exactly what both Congress and this Court have said it is not.

B. The Second Circuit properly considered and resolved McDonough's claim as a due process claim.

Although Petitioner persistently declines to specify which constitutional right underlies his "fabrication of evidence" claim, the Second Circuit unambiguously characterized it as a claim of "denial of due process based on fabricated evidence." *McDonough v. Smith*, 898 F.3d 259, 260 (2d Cir. 2018). That characterization was drawn directly from Petitioner's own briefs, which expressly distinguished his "due process fabrication of evidence" claim from his "malicious prosecution" claim. Br. of Pl.-Appellant 1, 2–3, *McDonough v. Smith*, No. 17-296 (2d Cir. 2017); *see also id.* at 5 (distinguishing "due process fabrication of evidence" claim in Count I from "malicious prosecution" claim in Count II).

Contrary to Petitioner's repeated suggestions, Br. of Pet'r 5, 41–43, there is no Fourth Amendment accrual issue before the Court. McDonough's Fourth Amendment "malicious prosecution" claim was found barred by absolute immunity and is not presented here. (Indeed, McDonough's Fourth Amendment claim is still being actively litigated in the district court against non-immune defendants.) To the extent this Court wishes to address accrual in the post-process, pre-trial Fourth Amendment context, it should grant the pending petition for certiorari in *Manuel v. City of Joliet*, 137 S. Ct. 911 (7th Cir. 2017), *petition for cert. filed*, No 18-1093 (U.S. Feb. 21, 2019).

It was thus specifically in the context of due process that the Second Circuit determined that the "standard" rule of accrual applied to the claim at issue here. In fact, the Second Circuit identified the circuit split on the accrual question as relating specifically to the "due process fabrication cause of action." *McDonough*, 898 F.3d at 267. That is the only split the Court should use this case to resolve.

II. Both precedent and policy considerations confirm that McDonough's § 1983 due process claim accrued when he learned that fabricated evidence was used to deprive him of liberty.

A. A § 1983 claim accrues when the plaintiff has a complete and present cause of action, subject to exceptions not present here.

In *Wallace*, this Court explained that § 1983 claims are generally governed by the "standard" common-law accrual rule, under which a claim accrues "when the plaintiff has a complete and present cause of action." *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry and Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). That is, the claim accrues when "the plaintiff can file suit and obtain relief." *Id.* (quoting *Bay Area Laundry*, 522 U.S. at 201).

Under the standard rule, determining the accrual of McDonough's due process claim is straightforward. As the Second Circuit explained, "a fabrication of evidence claim accrues when (1) "a plaintiff learns of the fabrication and it is used against him," and (2) "his liberty has been deprived in some way." *McDonough*, 898 F.3d at 266. There is "no dispute" that

"McDonough suffered a liberty deprivation because of that [fabricated] evidence when he was arrested and stood trial," and there is no doubt that McDonough learned of this fact no earlier than the date of his arrest and no later than "the end of his first trial." *Id.* at 267. Because both those dates occurred more than three years before McDonough filed his § 1983 action, the Second Circuit correctly determined that his due process claim was time-barred.

There can be exceptions to the standard accrual rule where strong countervailing considerations exist. The Court has identified two such exceptions. In *Wallace*, the Court acknowledged the need for a "refinement" of the standard rule for pre-process Fourth Amendment false-arrest claims based upon "the common law's distinctive treatment of the torts of false arrest and false imprisonment," under which accrual of those claims is delayed until "the alleged false imprisonment ends" upon the initiation of process. *Wallace*, 549 U.S. at 389 (quoting 2 H. Wood, Limitation of Actions § 187d(4), p. 878 (rev. 4th ed.1916)). The rationale for that refinement of the standard rule is the practical "reality that the victim may not be able to sue while he is still imprisoned." *Id.*

Similarly, in *Heck*, 512 U.S. at 489, the Court modified the standard accrual rule for § 1983 claims for damages attributable to an unconstitutional conviction or sentence, holding that such claims do not accrue until the conviction or sentence has been invalidated. In crafting this "*Heck* bar" to claim accrual, the Court explained that it was compelled by the "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 486. As this

Court subsequently clarified, the *Heck* bar applies only "when there exists a conviction or sentence that has *not* been . . . invalidated"; applying the *Heck* bar to "an action which would impugn an *anticipated future conviction*" would constitute a "bizarre" extension of the doctrine. *Wallace*, 549 U.S. at 393.

McDonough's claims are readily distinguishable from those presented in *Wallace* and *Heck*. *Wallace* involved a pre-process Fourth Amendment false-imprisonment claim; McDonough's claim arises under the Due Process Clause and does not implicate the scenario in which "the victim may not be able to sue while he is still imprisoned."[1] *Wallace*, 549 U.S. at 389. The constitutional provision invoked in *Heck* is not entirely clear, but it is undisputed that McDonough, unlike the plaintiff in *Heck*, is not the subject of any "outstanding criminal judgment" that would bar his claim. *Heck*, 512 U.S. at 487. Without a conviction or sentence, the concerns justifying the bar do not exist and it does not apply.

The standard accrual rule thus governs McDonough's claim, unless for some reason a different rule would better serve the "values and purposes" of the Due Process Clause. *Manuel*, 137 S. Ct. at 921. We address that question below.

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[1] To the extent McDonough argues that he was effectively "imprisoned" by the terms of his post-indictment release, such that he was barred from filing a § 1983 suit prior to acquittal, that argument was never presented to either the district court or the Court of Appeals. Accordingly, it is waived.

B. The delayed-accrual rules proposed by McDonough do not comport with the values and purposes of due process and are bad public policy.

Both doctrinal and practical considerations support the Second Circuit's application of the standard accrual rule to McDonough's due process claim.

1. McDonough's proposed accrual rules do not comport with the "values and purposes" of the asserted due process right.

Although common-law tort principles may provide a "guide" in determining the "contours and prerequisites" of a § 1983 claim, "including its rule of accrual," the common law does not subsume underlying constitutional principles. *Manuel*, 137 S. Ct. at 920. Rather, "in applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue"—here, the right not to be deprived of liberty without due process. *Id.* at 921.

The delayed-accrual rules proposed by McDonough are not consistent with established due process doctrine. As a threshold matter, linking claim accrual temporally to the challenged deprivation—as the standard rule does—allows abuses to be promptly brought to light and corrected, consistent with the Due Process Clause's overarching concern with ensuring "fair administration of justice." *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971). More important, the standard accrual rule comports with existing due process doctrine, under which an unlawful deprivation of liberty is actionable *even if the victim is never prosecuted*. *See, e.g., Zinermon v.*

Burch, 494 U.S. 113 (1990) (finding that non-prosecuted mental health patient sufficiently stated § 1983 claim for deprivation of liberty without due process). By allowing plaintiffs to sue immediately upon the unlawful deprivation, the standard rule gives direct and immediate effect to the due process right.

By contrast, the proposed "favorable termination" accrual rule is inconsistent with established due process principles. Because a due process fabrication of evidence claim is cognizable whether the victim is prosecuted or not, there is "no good reason why the accrual of a claim," like McDonough's, "should have to await a favorable termination of the prosecution." *Manuel I*, 137 S. Ct. at 926 (Alito, J., dissenting). Indeed, in this context a favorable termination accrual rule "makes no sense." *Id.* at 925 (Alito, J., dissenting).

2. McDonough's proposed accrual rules would needlessly burden local officials and deprive them of the protection of the statute of limitations.

Petitioner repeatedly invokes the "unnecessary burdens" and "uncertainty" that an early accrual rule would purportedly impose on defendants, arguing that the standard accrual rule "is of no service to public officials." Br. of Pet'r 5, 18, 53. *Amici*, as the organizations representing the interests of those public officials, strongly reject Petitioner's attempt to co-opt their members in support of a delayed accrual regime that would be inimical not only to their interests, but to the public's interest in the sound and predictable administration of justice.

Contrary to Petitioner's suggestions, the interests of local governments and officials—and of the public they represent—are best served by the standard accrual rule. By maintaining a close temporal nexus between the asserted constitutional injury and claim accrual, the standard rule serves "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). By contrast, Petitioner's preferred rule would undermine those policies by permitting the indefinite deferral of § 1983 claims through one or more trials, appeals, and collateral attacks on conviction. A prosecutor or other government official might be forced to wait many years—conceivably even decades—before learning that she has been accused of unconstitutional conduct. To the extent Petitioner is concerned about officials' ability "to calculate with certainty when their Section 1983 liability draws to a close," Br. of Pet'r 52, he should favor the standard rule—not a favorable termination rule that may result in indefinite claim deferral.

A delayed-accrual regime also results in intractable problems of proof that impede the administration of justice. The longer the temporal gap between the allegedly unconstitutional action and the plaintiff's § 1983 claim, the more difficult it becomes to both assert and defend the claim. As this Court explained in *Wilson v. Garcia*, "[j]ust determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." 471 U.S. 261, 271 (1985). And as a practical matter, adoption of a favorable-termination accrual regime would impose on local governments an obligation to

retain indefinitely evidence and records of an almost infinite array of events—an unnecessary and impracticable administrative burden on governments and agencies that already face severe resource constraints.

As this Court has recognized, "[s]tates and municipalities have a strong interest in timely notice of alleged misconduct by their agents." *Wallace*, 549 U.S. at 397 (quoting Br. for State of Illinois et al. as *Amici Curiae* 18). Petitioner's suggestion that local governments and officials would "prefer the possibility of a later § 1983 suit to the more likely reality of an immediate filing . . . is both implausible and contradicted by those who know best"—the municipal organizations that *amici* represent. *Wallace*, 549 U.S. at 397.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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No. 18-485

In The
Supreme Court of the United States

EDWARD G. McDONOUGH,

Petitioner,

v.

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE FOR THE ST. THOMAS MORE LAWYERS GUILD OF ROCHESTER, NEW YORK IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The St. Thomas More Lawyers Guild ("The Guild") is an IRC 501(c)(3) corporation and association of attorneys in the Rochester, New York area committed to the Catholic principles of natural law, natural reason, and the traditions of natural rights that animated our nation's founding.

The Guild believes that jurisprudence in the United States frequently strays from these fundamental principles. Specifically in this case, the Guild seeks the restoration of the traditional and time honored axioms of due process. Chief among these axioms is the concept of fundamental fairness to defendants in criminal proceedings, and redress for injured parties when our courts have fallen short in their observance of this transcendent moral and legal value.

I. SUMMARY OF THE ARGUMENT

As long ago as 1935, this Court held that deliberate lying and cheating by government officials *to obtain a criminal conviction* violated an accused's

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[1] In accordance with Supreme Court Rule 37(3)(a) and (b), the Guild sought the consent of both parties to file the within proposed brief. Petitioner has filed a blanket consent form as of February 26th; Respondent consented by email to undersigned counsel on March 1st, 2019. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Fourteenth Amendment right to due process of law. *Mooney v. Holohan*, 294 U.S. 103 (1935). In this case government officials lied and cheated in an effort to obtain a criminal conviction but the accused, although tried twice, was ultimately acquitted.

Amicus is concerned that in the wake of *Manuel v. City of Joliet*, 580 U.S. ___, 137 S.Ct. 911 (2017) this Court may regard the present case as involving pretrial Fourth Amendment constitutional violations that time bar the accused's resulting action for damages under 42 U.S.C. §1983. We believe the Court should reject a Fourth Amendment analysis in this case. *Deliberate* conduct by government officials actually intended to injure should be, and historically has been, regarded as implicating due process rights, not Fourth Amendment rights. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

While there has been considerable confusion in the circuit courts and this Court on this and related questions over the last two decades, the great weight of circuit court authority has nevertheless continued to regard the kind of deliberate conduct at issue in this case in due process terms. And because an explicit and unambiguous restoration of traditional due process principles in line with this authority would more clearly resolve the statute of limitations issue presented by this case – while at the same time providing clearer guidance in future cases – this amicus urges the Court to decide in favor of the Petitioner on that basis.

In other words, we ask this Court to hold firmly that deliberate lying and cheating by government

officials at any point in a criminal prosecution causes a corruption of the process and a constitutional injury that ceases only when the corrupted process itself is *corrected*, which means simply that it ends favorably to the accused.

II. ARGUMENT

A. DUE PROCESS TRADITIONALLY APPLIED TO ALL STAGES OF A CRIMINAL PROSECUTION

Until fairly recently there had never been any doubt that the requirement of due process for criminal defendants encompassed " . . . the entire course of proceedings in the courts of the State, and not merely a single step in those proceedings. . . ." *Frank v. Mangum*, 237 U.S. 309, 331-332 (1915); *accord*, *Malinski v. New York*, 324 U.S. 401, 416-417 (1945). "Due process" later came to include a requirement of basic honesty and good faith on the part of government officials so that a conviction obtained through *deliberate* fabrication of evidence, suppression of exculpatory evidence or use of perjured testimony was held to be invalid on due process grounds. *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959); *Miller v. Pate*, 386 U.S. 1 (1967). Due process was also held to prohibit law enforcement misconduct preceding – and even wholly outside of – the criminal judicial process, such as when that misconduct "shocked the conscience." *Rochin v. California*, 342 U.S. 165 (1952).

Still later this Court held that an improper motive on the part of a prosecutor – "prosecutorial vindictiveness" – invalidated a criminal prosecution entirely, requiring the dismissal of the criminal charges themselves, once again on due process grounds. *Blackledge v. Perry*, 417 U.S. 21 (1974).

B. THE GENESIS OF A CONTRARY VIEW, BASED ON AN ERROR

As the 1970s continued, however, a counter-trend developed. In a significant case the Ninth Circuit held that perjury used before a grand jury *unintentionally* by a prosecutor[2] – who not only disclosed it to opposing counsel but admitted it before the trial jury – required reversal of the conviction and dismissal of the indictment under the *Mooney* line of cases. *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974). The decision was not well received. *United States v. Udziela*, 671 F.2d 995, 1000 (7th Cir. 1982) (collecting cases).

Then newly appointed Justice Rehnquist embraced this counter-trend. Believing in the importance of preserving " . . . the perception of the trial of a criminal case in state court as a decisive and portentous event . . . " [*Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)], he took issue with the proposition that the prosecution's use of perjured testimony before a grand jury deprived a defendant of due process of law, in a

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[2] Because the prosecutor's conduct was not in bad faith, it is likely that the *Basurto* decision should not have been considered under the *Mooney* line of cases at all.

rare opinion as a circuit justice. *Bracy v. United States*, 435 U.S. 1301 (1978). In so doing he cited *Costello v. United States*, 350 U.S. 359 (1956) and *Mooney*, stating that the latter " . . . held that the knowing introduction of perjury *at a criminal trial* rendered the resulting conviction constitutionally invalid." (emphasis supplied).

Unfortunately, this was an entirely incorrect statement of the law: *Costello* was not a due process case at all, and *Mooney*'s due process proscription against deliberate official misconduct in "obtaining a conviction" had never been confined to conduct occurring at a trial. Indeed, there were a series of cases decided by this Court in the 1940s overturning criminal convictions based on guilty pleas, citing *Mooney*, where there was no trial at all. *Walker v. Johnston*, 312 U.S. 275 (1941); *Waley v. Johnston*, 316 U.S. 101 (1942); *New York ex rel. Whitman v. Wilson*, 318 U.S. 688 (1943).[3]

C. THE CONFLATION OF DUE PROCESS WRONGS WITH IMMUNITY QUESTIONS

Meanwhile, beginning around the same time as the counter-trend this Court was developing the law of "absolute" and "qualified" immunity for prosecutors and police in §1983 actions over misconduct during the

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[3] It is unlikely that Justice Rehnquist ever genuinely held the view that due process did not apply to pretrial government conduct: he later joined an opinion by Justice Thomas that explicitly endorsed the application of due process to a police interrogation, before any charges were even brought. *Chavez v. Martinez*, 538 U.S. 760, 773 (2003).

course of criminal prosecutions, beginning with *Imbler v. Pachtman*, 424 U.S. 409 (1976). Two noteworthy decisions in the early 1990s considered whether absolute prosecutorial immunity would extend to pretrial conduct such as presenting false evidence at probable cause hearings and wrongly advising police during an investigation: *Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

These decisions not only resonated with Justice Rehnquist's *Bracy* view[4]; they apparently accustomed this Court to viewing criminal prosecutions in discrete, time divided segments – e.g., before charges are brought, after initiation of process, pre-trial judicial proceedings, and the trial itself – for purposes of deciding whether a prosecutor was absolutely immune from suit.[5] But shortly after *Burns* and *Buckley* this analytical device, however useful it may have been in defining the scope of absolute prosecutorial immunity, spilled over into the question of whether there had been a constitutional violation in the course of a criminal prosecution in the first place, and if so what specific constitutional provision was involved.[6]

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[4] Also by 1991, *Bracy* was cited in a United States Justice Department Grand Jury training manual for the proposition that " . . . most courts view grand jury proceedings as outside the scope of the due process clause. . . ." *USDOJ Grand Jury Training Manual, Antitrust Division, First Edition* (November, 1991), p. IV-97.

[5] This approach was subtly incompatible with the traditional view that due process in criminal cases encompassed the entire process from the beginning.

[6] Ironically, an apparently prescient *Buckley* majority noted the danger of "conflating" questions of immunity with questions

The result was a fractured decision (five different opinions for affirmance and a two Justice dissent) from this Court in 1994. *Albright v. Oliver*, 510 U.S. 266 (1994). Significantly, a footnote in the plurality opinion, authored by Justice Rehnquist, repeated the error he had made earlier in *Bracy* to the effect that the *Mooney* due process line of cases pertained only to the use of perjury at a trial. 510 U.S. at 273, fn. 6

In her influential concurring opinion in *Albright*, however, Justice Ginsburg suggested that the Fourth Amendment was a better "lens" (510 U.S. at 276) through which to view the issue of the pre-trial use of false allegations by government officials in criminal prosecutions and the attendant damages in §1983 actions.[7] Justice Ginsburg thus would have preserved a cause of action for Albright, except that Albright had expressly waived any claim under the Fourth Amendment and elected to proceed exclusively on due process grounds.[8]

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regarding the substance of a constitutional violation, claiming that the dissent had done precisely that. 509 U.S. at 274, fn. 5.

[7] Justice Ginsburg's view may have been further prompted by the complicating fact that *Albright* involved incredibly sloppy police work (use of a notoriously unreliable informant) instead of the traditional due process issue of *deliberate* misconduct. That is, she may never have meant to suggest that the kind of deliberate and malicious conduct at issue in this case implicated Fourth Amendment rather than due process concerns.

[8] In *Manuel v. City of Joliet*, the Petitioner did the reverse; that is, he waived any reliance on due process grounds and proceeded entirely under a Fourth Amendment rationale. One relevant problem with that – as Justice Alito pointed out at length in dissent – is that the Fourth Amendment does not involve a

Justice Stevens retained the traditional view that a due process violation might occur at any stage of a criminal prosecution, but of course in *Albright* he was writing in dissent, joined only by Justice Blackmun.

D. THE FALLOUT FROM *ALBRIGHT*

1. *ALBRIGHT* ASIDE, THERE IS A CONSENSUS IN THE NATION'S COURTS OF APPEALS THAT DUE PROCESS, AND NOT THE FOURTH AMENDMENT, GOVERNS CLAIMS LIKE THIS PETITIONER'S

Despite the ambiguity generated by the *Albright* decision and its foray into Fourth Amendment analysis, however, circuit courts have almost uniformly continued to regard deliberate lying and cheating by government officials in criminal prosecutions as a due process concern, regardless of when in the process it had occurred or even whether there had been a conviction. *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001); *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2001); *McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922 (8th Cir. 2008); *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012).[9] The most emphatic of these circuit

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"process" but rather "seizures" that end when they occur, and the concept of a "continuing seizure" that would imply a later starting point for a limitations period is ultimately untenable. 137 S.Ct. 926, et seq. (Alito, J., dissenting).

[9] But compare, *Alexander v. McKinney*, 692 F.3d 553 (7th Cir. 2012) (holding that an acquittal at trial "effectuated" due process, precluding a due process violation).

court opinions on this point came from the First Circuit:

> "Although constitutional interpretation occasionally can prove recondite, some truths are self-evident. This is one such: if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from fabricating evidence and framing individuals for crimes they did not commit. Actions taken in contravention of this prohibition necessarily violate due process (indeed, we are unsure what due process entails if not protection against deliberate framing under color of official sanction)."

Limone v. Condon, 372 F.3d 39, 44-45 (1st Cir. 2004).

2. NEVERTHELESS, THE CONFLATION WITH IMMUNITY ISSUES CONTINUES TO CLOUD THE DUE PROCESS ANALYSIS

Yet perhaps the most pertinent of the circuit court decisions for present purposes was from the Second Circuit, because in *Zahrey* – as here – there was never a conviction. 221 F.3d at 346

Zahrey reached the right result – holding that a §1983 cause of action grounded in fabrication of evidence by government officials sounded in due process – but the court also exacerbated the problem of conflating immunity with its analysis of the constitutional wrong:

> "We think the right at issue in this case is appropriately identified as the right not to be deprived of liberty as the result of the fabrication of evidence by a government official *acting in an investigative capacity*."

221 F.3d at 349 (emphasis supplied).

The distinction between acting in an "investigative capacity" as opposed to an "advocacy role" determines whether a prosecutor is *immune*, not whether a constitutional injury occurred. Conflating these two issues immediately forced the Second Circuit to address – in a rather confusing five and one half pages (221 F.3d at 349-355) – a causation question that disappears once the conflation is eliminated.

In other words, like this Petitioner's constitutional injury *Zahrey*'s is properly viewed as being caused by the *process* having been corrupted by government officials through their fabrication of evidence, and his injury at the hands of that process continued until the corrupted process was terminated by his acquittal.

3. THE CONFUSION FOUND ITS WAY TO THIS COURT IN 2009 BUT THE COURT WAS NOT ABLE TO ADDRESS IT

The last time this Court fully considered the due process ramifications of deliberate fabrication of evidence and similar dishonest conduct by government officials in criminal prosecutions was in an appeal from the Eighth Circuit's *Pottawattamie* case (Supreme

Court Docket No. 08-1065). One relevant exchange took place at oral argument[10] between Justice Kennedy and Mr. Katyal (who represented the Solicitor General in *Pottawattamie* but now represents the Petitioners here):

> JUSTICE KENNEDY: What if a prosecutor knows that it's fabricated evidence? The police officer fabricates the evidence and says: Mr. Prosecutor, it's a very bad man; I fabricated the evidence. The prosecutor introduces it. What result there? See, your footnote 6 presumes that the prosecutor doesn't know.
>
> MR. KATYAL: Right.
>
> JUSTICE KENNEDY: Suppose he knows?
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> MR. KATYAL: And if the prosecutor does know, we don't think that there is a Fifth Amendment due process violation.
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> JUSTICE KENNEDY: Against the policeman?
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> MR. KATYAL: Against – against the policeman in that circumstance, because the –
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> JUSTICE KENNEDY: Again, the more aggravated the tort, the greater the immunity.
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> MR. KATYAL: And I agree that that seems a little odd –

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[10] The official transcript of the oral argument in *Pottawattamie* is located on this Court's website here: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2009/08-1065.pdf.

> JUSTICE KENNEDY: You're basically saying that you cannot aid and abet someone who is immune, and that's just not the law . . .

Official transcript, 08-1065, pp. 20-21.

Later in the argument, another relevant exchange occurred between Justices Ginsburg, Stevens and Mr. Sanders (representing the Petitioners):

> JUSTICE GINSBURG: You said – I think your position is that due process begins when trial is underway, and before that due process doesn't enter the picture?
>
> MR. SANDERS: Your Honor, I believe that this Court's decisions make clear that due process applies to the judicial process; that is, the filing of charges and the later conduct of the prosecuting –
>
> JUSTICE STEVENS: Yes, but what about the pretrial detention? Isn't that a deprivation of liberty?
>
> MR. SANDERS: Your Honor, it would be, but that would be Fourth Amendment territory.
>
> JUSTICE STEVENS: Why would it be Fourth Amendment? Why isn't it Fourteenth Amendment right on the nose? They're deprived of liberty without due process of law.
>
> MR. SANDERS: Your Honor, this Court – seven justices in this Court's decision in *Albright* agreed that there was no due process cause of action for the wrongful institution of criminal proceedings . . .

Id., pp. 59-60.

Unfortunately, after argument and submission for decision the parties in *Pottawattamie* settled and the case was dismissed under Supreme Court Rule 46. This Court was thus never able to address the confusion surrounding due process and immunity issues in the wake of *Albright* in that case, and could not do so in 2017's *Manuel* because the Petitioner in that case abandoned all reliance on due process principles.

III. CONCLUSION

This Court should take the opportunity it has now, in this case, to clarify and simplify the law in this important area by holding plainly that deliberate dishonesty by government officials in criminal cases – whether through fabricating evidence, willfully suborning perjury or like conduct – violates an accused's right to due process of law, and that violation continues until the tainted process ends with dismissal of the criminal case in the accused's favor.

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Respectfully submitted,

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